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FOREWORD

Thomas K. Clancy[*]

The National Center for Justice and the Rule of Law,[1] which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system. Its purpose is to promote the two concepts comprising the title of the Center. The concept of "justice" appeals to basic notions of equality, equity and fairness, often with an emotive component. In contrast, the phrase "rule of law" refers to the requirement that certain procedures and principles must be followed in each case to reach a correct result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs, and publications that examine important criminal law and procedural issues.

In furtherance of that mission, the Center has created the Prosecutorial Externship Program. Its Director is Professor Hans Sinha. Through this program, law students are placed as externs in local, state, and federal prosecutor offices, gaining hands-on experience by observing and participating in the work of prosecutors. They also gain theoretical

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[*] Director, National Center for Justice and the Rule of Law, and Visiting Professor, University of Mississippi School of Law. J. D., Vermont Law School; B.A., University of Notre Dame.

[1] The National Center for Justice and the Rule of law is supported by Grant No. 2000-DD-VX-0032, awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles produced for this symposium are those of the authors and do not represent the official position of the United States Department of Justice.

knowledge of the role of the prosecutor in America by enrolling in a concurrent class entitled *The Prosecution Function*. The Center also places students nation-wide as summer interns in prosecutor offices and in such prosecution-related organizations as the National Association of Attorneys General and the American Prosecutors' Research Institute.

The Center seeks to promote the development of prosecution externship programs. As reflected in former Attorney General Janet Reno's comments to this symposium, such programs help instill in future prosecutors the importance of the rule of law and the ideals of justice. In furtherance of these ends, the Center has sponsored this symposium issue of the *Mississippi Law Journal*, which is dedicated to scholarly articles and commentary probing various aspects of prosecution-oriented clinical and externship programs. It is our hope that the ideas expressed in this symposium will provide insights to law school administrators and clinical educators that help them improve existing programs and underline the benefits of creating such programs where they do not now exist.

Although the University of Mississippi is not unique in recognizing the need for and desirability of exposing future lawyers to the varied work and unique responsibilities of prosecutors, this symposium highlights the crucial need for educational opportunities for law students interested in careers as prosecutors. This symposium issue contains articles by distinguished scholars who represent diverse programs and different geographical locations. Professor Sinha's introduction outlines those articles, which discuss such diverse topics as the use of boot camps to commence the clinical experience, the need for ethics and professionalism in clinical prosecution programs, pedagogical methods such as reflective journal requirements, and analysis of the various types of prosecutorial programs. In light of the fact that most prosecutors in the United States work in small and medium sized offices, several articles focus on externship programs in rural areas.

The National Center for Justice and the Rule of Law is pleased to be able to contribute this symposium to the field of clinical legal education. I believe that it furthers the Center's mission and contributes to our criminal justice system by helping to provide insights into the different educational models that can provide future generations of prosecutors with a quality educational background that emphasizes the unique ethical role that prosecutors have of ensuring justice and respect for the rule of law. I and the Center thank General Reno and each of the other authors, who offer considerable insight into the special place in legal education that prosecution training should have. Finally, I thank and commend Professor Sinha for his tireless efforts in developing and shepherding this symposium issue from its conception to fruition. Without him, this project would not have been possible.

INTRODUCTION

Hans P. Sinha[*]

Legal education today comprises more than the mere reading of appellate decisions. It has to. If nothing else, students would not stand for being handed a diploma at the end of three very expensive years and then told to go learn how to practice law somewhere else. This is particularly so for the thousands of law school graduates across the nation who either hang out a shingle, join smaller firms or go into public service-a group which together comprises the majority of the academy's graduates. As a result, in the last quarter of a century, law schools have developed clinical programs through which law students can supplement their doctrinal course studies with actual live-client experiences. While students may learn to think as judges in their doctrinal courses, they learn to think and act as lawyers in their clinical courses. Ideally a law student should be able to do both upon graduation. With that in mind, the goal of clinical legal education is not to supplant the traditional Langdellian notion of American legal studies, but rather to enhance legal education by offering students the opportunity to learn the actual practice of law through participation in carefully constructed and supervised clinical programs.

One component of clinical legal education is comprised of prosecution programs, including externship, in-house, and hybrid programs. In furtherance of seeking to provide a model program for such prosecution clinical programs, and espe-

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[*] Clinical Professor and Director of Prosecutorial Externship Program, the National Center for Justice and the Rule of Law, and Director of Public Service Internship Program, the University of Mississippi School of Law. B.A., University of Pennsylvania 1983; J.D., Tulane School of Law 1988; LL.M. in International and Comparative Law (*with distinction*) Tulane School of Law 2001.

cially prosecution externship programs, the National Center for Justice and Rule of Law at the University of Mississippi School of Law has sponsored this symposium issue of the *Mississippi Law Journal* dedicated solely to articles exploring prosecution clinical programs. As Professor Thomas Clancy, Director of the Center notes in his foreword, it is the goal of the Center to provide and disseminate a model program which other schools can emulate. Certainly the articles collected in this symposium issue, when read together, fulfill this goal. Also as Professor Clancy notes, this goal would not have been possible without the contributing authors, a group which comprises established as well as emerging clinicians, recognizing the special contribution to the field of clinical legal education this symposium issue will bring. I join Professor Clancy in personally and wholeheartedly thanking these authors.

A person reading the articles collected in this symposium issue, whether he or she be a lay person, an educator or a clinician seeking to start a new clinical prosecution program, or improve upon an existing one, will find scholarly discussions about virtually all facets of prosecution programs. The symposium issue begins, and appropriately so, with a comment by former Attorney General Janet Reno entitled *The Importance of Prosecution Training in Law School.* General Reno crystalizes what we all know: that prosecutors play a special and powerful role in our society. With that power comes a special duty. General Reno notes that law schools, through clinical programs geared towards prosecutors, have a unique opportunity and a corresponding duty, to ensure that law students wishing to become prosecutors upon graduation, understand and embrace the unique ethical and professional requirements of the American prosecutor.

In keeping with General Reno's emphasis on ethics and professionalism, Professor Stacy Caplow, Director of Clinical Education at Brooklyn Law School, and Professor Peter A. Joy, Director of the Criminal Justice Clinic at Washington

University School of Law in St. Louis, both discuss the subject of ethics and professionalism, arguably one of the most, if not the most, crucial issue in live-client clinical programs in general, and in prosecution clinical programs in particular. Professor Caplow in her article *Tacking Too Close to the Wind: The Challenge to Prosecution Clinics to Set Our Students on a Straight Course*, explores the conflicting influences of the prosecutor's role to do justice and a culture within some prosecutor offices that place an inordinate emphasis upon conviction rates. Professor Caplow argues that clinicians have a special role and duty in ensuring that students recognize and properly deal with these conflicting pulls. Professor Joy in his article *Prosecution Clinics: Dealing with Professional Role*, explores the historical role of clinical legal education and particularly prosecution clinical programs. Professor Joy further examines the role of the prosecutor as a Minister of Justice, and compares the role of the defense attorney with the role of the prosecutor, and emphasizes the importance of exploring these roles with students in prosecution clinical programs.

Prosecution clinical programs, whether externships, in-house or hybrid programs, are unique in that students very quickly are placed in positions of enormous power. Their decisions, albeit guided by supervising attorneys, have real and direct influences upon citizens. As such, how to educate and quickly bring these students up to speed on subjects pertinent to the use of this power, is always an issue for those directing clinical programs. Professor Larry Cunningham of Texas Tech University School of Law and Director of their Criminal Justice Clinic, explores innovative ways of "front-loading" instructions for incoming clinical students through the use of "boot camps." In his article entitled *The Use of "Boot Camps" and Orientation Periods in Externships and Clinics: Lessons Learned From a Criminal Prosecution Clinic,* Professor Cunningham, among other relevant topics, addresses the issue of whether a clinic or externship, particularly one involving criminal prosecution, can be more effectively taught using such methods.

Three articles discuss existing prosecution programs. Two of these present the reader with a contrasting view of prosecution clinical programs in an urban setting (San Diego) and in a non-urban setting (Montana). This contrast is particularly important considering that the majority of prosecutors work in smaller rural and non-urban offices. The third article discusses the prosecution clinic at a school (New Mexico) where the clinical program has been fully integrated into the law school curricula and faculty. Professor Jean Montoya in her article *The University of San Diego Criminal Clinic: It's All in the Mix*, presents the University of San Diego's prosecution program and discusses the evolution of this program from its inception in 1973 to a unique program which today brings students who envision themselves future prosecutors together with those who envisions themselves future criminal defense attorneys. Professor Margaret A. Tonon in turn discusses the University of Montana's prosecution clinical program which is both a hybrid type program and located in a rural (non-urban) setting. In her article entitled *Beauty and the Beast: Hybrid Prosecution Externships in a Non-Urban Setting,* Professor Tonon explores the benefits of a hybrid prosecution clinical program, and discusses how combining a hybrid program with a non-urban setting creates a unique and beneficial learning atmosphere.

Professor Lisa Torraco of the University of New Mexico School of Law, dissects one of the older prosecution clinical programs located at a law school which has fully integrated the clinical program with the doctrinal course program. In her article entitled *The New Mexico District Attorney Clinic: Skills and Justice*, Professor Torraco discusses the current state of this established program, and how the two main components—the classroom component and the courtroom component—combine to teach skills and address the justice facet of criminal prosecution. Tying in with Professor Cunningham's discussion of "boot camps," Professor Torraco also discusses New Mexico's similarly front-loaded classroom

component, albeit through a six week course as opposed to a three day "boot camp."

Professor William P. Quigley, Director of the Loyola Law Clinic at Loyola University New Orleans School of Law, deals with one of the most ubiquitous, and inherently difficult, tools used by externship programs to ensure that their pedagogical (or andragogical depending upon one's point of view) goals of reflective learning are fulfilled-the maintaining of contemporaneous journals by the students. Professor Quigley in his article *Reflections from the Journals of Prosecution Clinic Students,* takes the reader on an insightful journey through actual prosecution externs' reflections on topics as diverse as compassion for defendants, the role of defense lawyers, the work of prosecutors outside of the courtroom, humility, humor, judges and victims, as well as two absolutely crucial topics for aspiring prosecutors-questioning the system and learning from mistakes.

As noted above, clinical programs can take many forms from traditional externship placements to pure in-house clinics to hybrid programs. Prosecution clinical programs, as all clinical programs, seek to innovate and adapt to the ever changing needs of the communities they serve. A model program would be amiss if it did not present a look at innovative programs in this field. Three articles do precisely this. Professor Mary A. Lynch, Co-Director of the Albany Law School Clinical Program, in her article *Designing a Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices,* provides an in-depth look at the institutional development and workings of one such innovative hybrid program. Professor Lynch also discusses how such an educational clinical program can better serve the community's need for an enhanced approach to the prosecution of domestic violence.

Professor Linda F. Smith, Clinical Program Director at the University of Utah S. J. Quinney College of Law, describes an established prosecution clinical program that utilizes a traditional externship model, but which, like San Die-

go, adopts an innovative facet wherein prosecution and public defender externs meet in the same classroom component. Professor Smith in her article entitled *Benefits of an Integrated (Prosecution & Defense) Criminal Law Clinic,* discusses the advantages of such an integrated program. In addition to discussing the parameter of the program as a whole, the article also provides pertinent excerpts from student reflections. One such reflection provides a most poignant vignette of personal growth by a prosecution extern, an experience which surely must have been life altering for the student, and extremely pedagogically rewarding for the professor.

Keeping in the mold of innovative programs, Professor Lisa Smith of Brooklyn Law School, explores a truly ground breaking innovation in prosecution clinical programs-a community prosecution clinic. In her article entitled *Community Prosecution: Can a Law School Prosecutors Clinic Adopt this Approach?*, Professor Smith explores a program wherein students in addition to handling only cases from one police precinct of a large metropolis, also immerse themselves in that community by meeting with community leaders, merchant associations and other community based groups. As with community prosecution programs in general, this clinical prosecution program seeks to move from merely managing caseloads in a reactive manner, to a proactive model which will have a direct positive impact upon the quality of life in that community.

Finally, I contribute an article seeking to explore the historical development and current status of prosecution externship programs in general. In an article entitled *Prosecutorial Externship Programs: Past, Present and Future,* the results of a nationwide survey of prosecution externship programs are presented, together with an analysis and comparison of such data in relation to earlier survey information as well as the evolving standards governing such programs. The ultimate hope of this article is that by presenting the state of prosecution externship programs today, and by comparing

when possible with the past, one can derive guidance for future model programs.

Again, I thank the authors who have contributed articles to this symposium issue, and hope the knowledge they impart will be enthusiastically received by the legal academy as a whole.

THE IMPORTANCE OF PROSECUTION TRAINING IN LAW SCHOOL

Attorney General Janet Reno[*]

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[1]

The above excerpt from Justice Jackson's famous speech to federal prosecutors demonstrates the enormous power, and accompanying responsibility, of the American prosecutor. Al-

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[*] Janet Reno. Miami, January, 2005; A. B. Cornell 1960; L.L.B. 1963, Harvard Law School; State Attorney General, Dade County, Florida, 1978-1993; United States Attorney General, 1993-2001.

[1] Justice Robert H. Jackson, speech at the Second Annual Conference of United States Attorneys, Washington D.C. (April 1, 1940).

though Justice Jackson delivered this speech more than sixty years ago, his words ring as true today as they did in 1940. If anything, the enormous power of a prosecutor, and the responsibility which comes with that power, have increased in the ensuing years. The yearly increase of state and federal criminal statutes, sentencing guidelines structures, whether mandatory or advisory, and the continued use and judicial affirmation of prosecutorial discretion, have all led to a strengthening of the role of the prosecutor in our criminal justice system. It is for this reason that academic training of law students interested in the field of public prosecution is so crucial.

When Justice Jackson spoke, few law schools provided clinical opportunities to their students. Today, many, if not all, law schools provide some sort of clinical training and many of those offer clinical programs directed specifically at providing students with both a theoretical and a practical exposure to the field of prosecution. All such program emphasize the importance of providing law students an understanding of the unique ethical and professional requirements of the prosecutor. Being imbued with the rules and standards that govern prosecutors, as well as the reasons for such rules, while still a law student, invariably will lead not only to effective prosecutors, but also to ethical and professional prosecutors.

Clinical programs at law schools, and especially prosecution programs, hold a special opportunity of bettering our criminal justice system. Clinical programs provide a wonderful opportunity to expose potential prosecutors to the many different disciplines that come into play in the criminal justice system. The ideal program should mine-and maintain-the idealism and desire to change and improve that is present in all young people, and instill in them the notion that crime does not happen in a vacuum. Let them, for example, consider and discuss whether society is better off incarcerating a drug offender without providing drug treatment. Give them the means with which to explore innovative and alternative ways of preventing, rather than merely prosecuting, crime. Expose them to the real and traditional workings of prosecutor offices,

and to interdisciplinary approaches to crime fighting. The unique ability of combining the vast resources of a university setting, together with the hands-on experience of a prosecutorial externship, is a perfect way to foster the force which Justice Jackson termed the most beneficent in our society.

Above all, utilize clinical programs to ensure that law students not only become strong, forceful, and effective prosecutors, but also just and fair prosecutors. In an era where one of the most important issues facing the criminal justice system involves wrongful convictions, it is especially important that clinical prosecution programs emphasize that the role of the prosecutor is not merely to win but to do justice. The law must truly be a shield for all the people, including victims and the wrongfully accused. The marvelous law we have in this country truly is, and must be, by and for the people.

Justice Jackson ended his speech by noting that:

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[2]

Clinical prosecution programs at law schools, as well as scholarly articles about such programs, further the goal of developing the type of prosecutors of whom Justice Jackson could, and indeed all of us can, be proud.

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[2] Jackson, *supra* note 1.

"TACKING TOO CLOSE TO THE WIND":* THE CHALLENGE TO PROSECUTION CLINICS TO SET OUR STUDENTS ON A STRAIGHT COURSE

Stacy Caplow[**]

A. INTRODUCTION

Clinical programs in which students work for, with, or as prosecutors are not *that* unusual. Many law schools have arrangements in which students work in the offices of local prosecutors, both state and federal, as interns assigned to a bureau or individual.[1] There, they might do the typical work of an intern, research and writing, or possibly take on more active tasks such as answering written motions, interviewing witnesses, performing field investigations, or acting as second-

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* Kyles v. Whitely, 514 U.S. 419, 439 (1995).

** Professor of Law and Director of Clinical Education, Brooklyn Law School. A big thank you to Hans Sinha for his initiative and patience in organizing this project and a salute to all of the clinical teachers who know so well the ups and downs of prosecution clinics. Thank you also to Gene Cerruti, Maryellen Fullerton and Minna Kotkin for their help on earlier drafts.

[1] Gathering information on clinics is difficult given the inclusive definitions of most programs. I surveyed law school web pages as of fall 2004 and counted any program described by the schools as including a prosecution component, whether in-house or externship. Seventy-six law schools listed some kind of prosecution clinical opportunity. Of those, sixteen seem designed to allow students to handle cases personally under the supervision of a prosecutor while the balance identify themselves as externships by offering either a specific prosecution program or by listing prosecutor's offices as available placement sites. A few programs have unique features. At Cardozo School of Law, students work full-time for a semester in the Manhattan District Attorney's Office. *See* http://www.cardozo.yu.edu/academic_prog/clinical_prog.asp (last visited Jan. 8, 2005). In the Prosecution Practicum at Ohio State University Moritz College of Law, students' in-court work is videotaped for review by faculty and students. *See* http://moritzlaw.osu.edu/centersandclinics/pros_clinic.html (last visited Jan. 8, 2005).

seat at a trial. In a few programs, students actually assume the responsibilities of the prosecution, appearing in court, negotiating dispositions and even conducting trials. The field-work supervision almost always is delegated to Assistant District Attorneys (ADAs) or Assistant United States Attorneys (AUSAs). A few schools have established more formal collaborations where an ADA is detailed to work exclusively in the clinic while the clinical teacher also may supervise the students' casework.[2]

Just as prosecutors often see themselves as a breed apart from other lawyers,[3] prosecution clinics seem to occupy a separate space, and in many fundamental ways do not share the concerns of other client-based clinics. While the work of student prosecutors does not always resemble that of their peers in other clinics, some prosecution clinics still attempt to promote autonomy and independent judgment within the boundaries of the role. But in the context of prosecution, students also are exposed to the multifaceted responsibilities and duties of prosecution, and learn to balance the many competing inter-

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[2] At Brooklyn Law School, we offer several variations of this model in cooperation with three prosecution offices. *See infra* text pp. 6-9 This also is the model that has been developed at New York University (NYU) School of Law and Pace University Law School in conjunction with the Office of the District Attorney of New York County. The Manhattan District Attorney (DA) would appoint to a two-year cycle with the clinic a senior ADA whose principal responsibility was the student supervision. A faculty member taught the seminar, but the level of participation of the ADA might vary from none to full partnership in the class. In 2000-2001, I taught the Prosecution Clinic at NYU as an adjunct. For a description of her experience teaching the Pace Prosecution of Domestic Violence Clinic, *see* Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client in Jail?,"* 69 FORDHAM L. REV. 997 (2000).

[3] *See, e.g.*, DAVID M. NISSMAN & ED HAGAN, THE PROSECUTION FUNCTION xi (1982) ("The nature of the prosecutor's function in the legal system tends to isolate him from the rest of the profession and to unite him with his fellow prosecutors."). The authors assert a kind of nationwide prosecutorial mentality with a shared "gallows humor" and extol the transformation of young prosecutors into "torpedoes," using imagery such as "battles," "attacks," "skirmishes," "soldiers," and "weapons and armaments" to describe the relationship of the prosecutor to defendants, defense attorneys, and even courts. *Id.* at 1. While every specialty may have its rhetoric, the warrior seems to be their chosen self-image.

ests at stake with a degree of authority, discretion and sometimes plain guts.[4] As I learned when making a career switch from single-focus, client-centered criminal defense work to prosecution, this balancing act is difficult to master and even more difficult to sustain in the daily environment of most criminal courts.[5]

Over the years, these differences have prompted me to ask repeatedly where prosecution clinics fit in the increasingly multi-hued tapestry of clinical education. Other than providing them with undeniably exciting, timely and marketable experience, do these clinics make any kind of lasting impression on the students who become prosecutors after graduation? Does the work of the clinician in a prosecution clinic inculcate any values that might cause its graduates to become a different kind of prosecutor from someone who never participated in such a law school program? By that, I do not mean a more technically skilled lawyer, capable of trying cases more competently or behaving with greater assurance in the courtroom.[6] What I question is whether we have any success in

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[4] Prosecutors have many loyalties and constituencies: the victim, the police, the court, the legal system, the community and the defendant. The classic formulation of this complex of duties is in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . . . [W]hile he may strike hard blows, he is not a liberty to strike foul ones.

[5] Others have noted the challenge of the cross-over experience. *See, e.g.*, Merton, *supra* note 2, at 998-1001; Abbe Smith, *On Representing a Victim of Crime*, *in* LAW STORIES 149 (Gary Bellow & Martha Minow eds., 1996).

[6] Many years ago, when clinics in general were starting to move from skills-based teaching to laboratories for theory, ethics and systemic critique, prosecution clinics were described by an instructor in such a clinic as "typically focus[ing] on the practical, day-to-day aspects of the prosecutor's office" rarely offering an occasion to discuss "the ethical and social issues that the prosecutor must face . . . or the role of the prosecutor in the American judicial system." Martin H. Blesky,

helping to create prosecutors whose everyday practice in the trenches reflects an entrenched commitment to a justice mission that can struggle successfully against a dominant culture that values conviction rates, discourages non-conformity and engenders cynicism.[7] While the same questions could be asked about any area of law practice, the received wisdom about the justice pursuit of prosecutors makes the struggle against these inducements more urgent and more vital to resist.

There are extensive examples of the misbehavior of prosecutors in cases involving trial misconduct, suppression of evidence, use of false testimony, abuse of power and, in some highly publicized instances, reluctance to reassess evidence of innocence.[8] Clinicians surely have to honestly and openly discuss this behavior. The challenge for clinicians who work with prosecution offices, either directly or by monitoring student interns, is to raise these issues with sufficient diplomacy to avoid alienating the host office and jeopardizing the clinic.[9]

On Becoming and Being a Prosecutor, 78 NW. U. L. REV. 1485, 1495 (1984). No doubt this has changed in many clinics, but those where the lion's share of the supervision and reflection is being guided by a professional prosecutor rather than an educator still may be too informed with a single perspective.

[7] This is only the first of many generalizations I venture about prosecutor's offices and the prosecutors themselves. Of course, there is both institutional and individual diversity between and among offices. Both policy and practice in particular instances reflect this.

[8] *See generally*, BENNETT L. GERSHMAN, PROSESCUTORIAL MISCONDUCT (2d ed. 2001) (providing the most comprehensive taxonomy of misconduct). In 1999, the Chicago Tribune ran a multi-day series written by Ken Armstrong and Maurice Possley about "cheating" in homicide convictions that were overturned because prosecutors failed to disclose evidence suggesting innocence or knowingly used false evidence. *See* Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, *available at* LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, *available at* LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, *Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, *available at* LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, *available at* LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, *True Patriot Not Quite a Shining Star*, CHI. TRIB., Jan. 9, 1999, *available at* LEXIS, News Library, Chi. Trib. File.; *see also* Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 125-29 (2004).

[9] To achieve this, among ourselves we must be candid about both the advan-

In this essay, I argue that clinicians in this milieu have an even greater than usual responsibility to prepare our students for the highest level of moral and honorable practice and to plant the seeds of resistance against the pull of species adaptation that is found in the strong institutional culture of most prosecutors' offices. Certainly there is abundant literature available that provides more than enough materials for a classroom component.[10] How to do this effectively is the challenge we face, and frankly one that I think we meet with mixed success. At the very least, if we do not already have an explicit goal to attempt to inspire ethical, empathic, self-conscious and individualistic prosecutors, we should. To give sustenance to this argument, I offer some organizing tools, including discussion topics and readings, to equip the prosecution clinic instructor for this charge.

Although many clinicians might cringe at the suggestion that we attempt to indoctrinate, or even influence, the future behavior of our students, preferring to allow them to find their own paths, in general, most of us are probably more directive than we would hope.[11] This essay argues that clinical

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tages and potential problems associated with these longstanding collaborations, in order to plan carefully so that students have the benefit of what often can be a vibrant setting in which to learn many basic litigation skills and to shoulder serious responsibilities. This symposium will contribute significantly to that effort.

[10] *See* books and articles discussed *infra*, Part D.1-7.

[11] A personal parenthetical: Whatever the subject matter of the clinical program, whatever the precise pedagogical method, whatever the goals of case or client selection, setting or skill focus, whatever the details of credits, grades or duration, clinical teachers share an identifiable set of objectives and a fundamental approach to their mission. At the risk of being offensively reductive, after almost thirty years of mingling in the community of clinical teachers I am going to venture a truism: Clinical law professors strive to create a learning environment in which students encounter the real work and the realistic problems of lawyers, and perform tasks in that context, all in a rarified environment dedicated to the students' professional development. Thus, the clinical teacher/supervisor's job is to question, to probe, to investigate, to engage, to react, to challenge, to inspire and to trust, in sum to provide the basis for launching self-critical, competent, confident lawyers. We try to offer the "ought" before the students enter the world of the "is." We attempt to show students what law practice might be like if we had none of the time or financial pressures of reality law; thus, when in the imperfect world, they can draw upon their rarified clinical lessons. Even, or may-

teachers in prosecution clinics must take on an aggressive, even explicit, role in inculcating an enduring justice mission that will be strong enough to withstand the pull toward acquiescence to contrary institutional norms. In clinics where students are given as much responsibility for exercising judgment and discretion as full-fledged junior prosecutors, and where independent thinking is a goal, we cannot afford to be oblique or subtle about our teaching mission. I suspect this might be heretical to most clinical teachers, but, once again, the distinctive characteristics of prosecution may necessitate different pedagogical goals and strategies.

B. The Inherent Characteristics of Prosecution Clinics

At Brooklyn Law School (BLS), we offer extensive clinical experiences in prosecution settings. Sketching these programs provides a quick overview of the range of programs available. First, we have a classic Criminal Practice externship where students work in prosecution offices, as well as defender services and criminal justice agencies. Externships where students are supervised by ADAs or AUSAs rather than faculty members are the most common prosecution clinic arrangement.

Since 1986, we also have offered another variation of the prosecution clinic: an "in-house" clinic taught exclusively by full-time faculty members under the aegis of the Kings County (Brooklyn) District Attorney.[12] Its office, and the courts

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be especially, when students intern off campus, away from our immediate supervision, we enhance their field work by engaging them in self-reflection exercises. Some clinical teachers see ourselves as role models, albeit imperfect ones. The metamorphosis from tyro to self-sufficient "expert" may not be complete until many years after graduation, but the process begins in this relatively safe, nurturing, student-centered setting. *See* Ass'n of Am. Law Sch., Section on Clinical Legal Education, *Report of the Committee on the Future of the In-House Clinic*, 42 J. Legal Educ. 511 (1992); *see also* User's Guide for Clinical Anthology: Readings for Live-Client Clinics 29-82 (Alex J. Hurder et al. eds., 1999).

[12] The only other reported example of this model is the University of Nebraska Criminal Practice Clinic. *See* Karen Knight, *To Prosecute Is Human*, 75 Neb. L. Rev. 847, 851-52 (1996). Judging solely from the law school's current web page, however, this program now seems to be an externship. *See*

where the students appear, are within a two block radius of the law school. This clinic began after I returned to the law school from an extended leave of absence as Criminal Court Bureau Chief in that office, and is an almost mirror-image of the misdemeanor defense clinic I took as a student and taught as a new clinician. Along with my colleague Lisa Smith, a veteran of the DA's Office, we enrolled between twelve and fourteen students each year. We were allowed to select appropriate misdemeanor cases to assign the students that ordinarily would have been handled by first-year ADAs. We were appointed Special Assistant District Attorneys because only a properly appointed ADA is authorized by law to prosecute.[13] On an almost daily basis, we would appear in Brooklyn Criminal Court with our students to handle every aspect of the case, from arraignment through plea negotiations and pretrial motions, to hearings and trial. Now taught entirely by Professor Smith, this program is still an important part of our clinical curriculum and is a key feeder to post-graduate jobs with DA offices throughout the city and regionally because the students' year of misdemeanor prosecution experience makes these students very attractive candidates.[14]

In 2002, the law school added another non-traditional prosecution clinic to our offerings. Students work in the United States Attorney's Office (USAO) for the Eastern District of New York (EDNY) prosecuting federal "petty offenses."[15] Al-

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http://law.unl.edu/clinic.html (last visited Oct. 29, 2004).

[13] N.Y. COUNTY LAW § 700 (McKinney 1950)

[14] At one point during her more than fifteen years at the law school, Lisa Smith took a leave of absence and then worked part-time as Special Executive Assistant-in-Charge of Domestic and Child Abuse from 1996 to 1998. As a result, she changed the emphasis of the clinic to domestic violence cases for several years. Last year, she again changed its design and created a community prosecution clinic which she describes in this symposium issue. Lisa Smith, *Community Prosecution: Can a Law School Prosecutor's Clinic Adopt This Approach?*, 74 MISS. L.J. 1281 (2005).

[15] We consider this hybrid program to be one of our in-house clinics because the students assume all lawyering responsibilities and are closely supervised by the adjunct instructors who are selected for their understanding of and commitment to their teaching responsibilities. Students appear in District Court pursuant to local court rules.

though this clinic is not taught by full-time faculty, the law school has contracted with two senior AUSAs to supervise the work of eight students who handle all phases of the prosecution personally. The AUSAs commit many hours of their workday to the eight clinic students and also teach the seminar. Last year, students obtained two convictions after trials before federal Magistrate Judges.[16]

Finally, students can choose a 'boutique' appellate clinic in which they brief and argue a respondent's appeal on behalf of the Manhattan District Attorney's Office. A senior supervisor, a BLS graduate who initiated this program years ago, works with three to four students each year overseeing their written and oral advocacy. Under her supervision, and after several moots with ADAs in her office, they argue before the Appellate Division, First Department, of the Supreme Court of the State of New York, an intermediate appellate court.

All of these programs, and particularly the trial level clinics, are highly sought by the students, and offer substantial exposure to the skills (interviewing, counseling, fact investigation, oral and written advocacy) and values (competence, self-development, professional improvement) common to any clinical program, and actually provide ample opportunities to "promote justice, fairness, and morality."[17] For the moment, they are an established component of our clinical program, which itself is extensive and varied in areas of practice, types of clients represented and lawyering skills emphasized.[18]

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[16] *See* Thomas Adcock, *Law Students Are Making Federal Cases*, N.Y.L.J., Jan. 23, 2004, at 16.

[17] These are the core values identified by the "MacCrate Report." A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSIONS: NARROWING THE GAP (1992).

[18] A description of the entire clinical program at Brooklyn Law can be found at the BLS website. *See* http://www.brooklaw.edu/academic/clinics/geninfo.php (last visited Feb. 12, 2005). It is worth mentioning that the future of the USAO Prosecution Clinic is precarious. The federal petty offense case normally is prosecuted by an agent rather than an AUSA, and many defendants appear *pro se*. The origin of our program is an ironic example of the connections forged in the clinical community. For many years, the NYU criminal defense clinic handled petty offenses in the EDNY. Their clinical instructor suggested that BLS start a pro-

Whatever the arrangement, prosecution clinics have several common features, and the aggregation of these characteristics distinguish all prosecution clinics from most other clinical programs.

1. No Independence—Multiple Overseers

Prosecution clinics are wholly dependent on a partnership with the office of the prosecutor. Although specific arrangements may be subject to some negotiation, the prosecutor's office has the final say about the types of cases students can handle and the courts in which they can appear. Most critically, it sets limits on the self-direction of the students' decision-making and discretion, and often even dictates who supervises them. This external oversight and control is not only different from the structure of other clinics, it also may well constrain the teaching and learning capabilities of the program. Because these clinics depend on the sponsorship of the prosecutor's office, clinic instructors rarely want to risk the existence of the program by deviating from office policies to approach a case too creatively or incompatibly with the office norms.[19]

Even the staple of clinical teaching – systemic critique – may falter when to do so challenges policies or norms negatively or skeptically. At the end of the day, the prosecutor's

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gram largely because having a lawyer, and even better a law student, on the prosecution side would improve the experience for the NYU students. For two years, BLS and NYU law students have been adversaries, a clinical dream (or nightmare) come true as each side overworked their cases in typical clinical law student fashion! Last year, NYU almost discontinued its program. Since this would have meant that our students would litigate against the defendants directly, not an ideal situation, if NYU were to cease operations, we probably would have to as well.

[19] In her article, Karen Knight sets forth a written memorandum of understanding between the County Attorney's Office and the University of Nebraska College of Law which delegates to the supervising faculty the "same degree of discretion with respect to case handling that any deputy in the office enjoys[,]" and that "[c]linic policies must be consistent with the policies and standards promulgated by the public prosecutor" and not "inconsistent with the educational mission of the clinic." Knight, *supra* note 12, at 867. This is an excellent precaution, possibly used by other schools also, although we have never reduced the terms of our cooperation to writing at BLS.

office may find the liabilities of the relationship outweigh the benefits, particularly in a location where other law schools compete for this resource. Finally, students may be reluctant to question openly the policies and norms of an office where they may be interviewing for post-graduate employment at the same time as they are taking the clinic.

2. No Client Representation—Multiple Roles

In a prosecution clinic, students do not have an identifiable client (whether an individual or an entity) so that many of the moral and ethical considerations that arise in the context of legal representation are missing. Observations about and reactions to these dilemmas often provide the richest fodder for both formal and ad hoc discussions in supervision sessions and in class. Issues of this nature actually do surface all the time for the government lawyer, particularly the public prosecutor, and can result in extremely rich and controversial discussions in the clinic seminar. But the approach of a prosecution clinic to these valuable discussions is necessarily quite different, circumscribed not only by role and policy, but also by confidentiality, security and public integrity. In addition, because most interpersonal interactions in a criminal prosecution are between the prosecutor and witnesses, whether victim, eyewitness or police officer, and sometimes the witnesses are uncooperative, unwilling and even complicit, the goals of this communication, as well as its very tone, are far from the client-centered, empathic approach that dominates clinical teaching.[20]

3. No Ivory Tower—Multiple Influences

Few clinical teachers would admit to wanting to be the exclusive influence or role model for our students. As a group,

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[20] In the past, I urged a victim-centered approach to prosecution based on respect, compassion and empathy that draws on values inherent in client-centered models. Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 37 (1998).

we are not competitive or territorial. On the other hand, most of us would admit that we rarely teach neutrally, but either directly or indirectly try to set our students on a path of social and self-awareness, to be caring, empathic, hardworking lawyers and individuals. Students interact with other influences all the time in school and at other jobs. Indeed, clinics in general call attention to the work of other lawyers, whether adversaries, co-counsel or judges. In an in-house clinic, with its truncated case load, those interactions may be quite limited. In contrast, by their nature, prosecution programs are located in the courthouse trenches where students work side-by-side with full-time prosecutors. There, clinic students are subjected to many more, and sometimes contradictory, influences than in the usual bell jar clinical environment where the clinical instructor's voice is often a powerful solo. This immersion provides many opportunities to observe critically a great number of situations and individuals, the fodder for rich reflection and classroom discussion. But it may also capture students, indoctrinating them with the received wisdom of the DA's office, exposing them to a dominant (and quite unselfcritical) culture, and transforming their behavior accordingly. Even if the clinical instructor offers alternative approaches, values and insights, the allure of the real world is inescapable, particularly if the student aspires to be a prosecutor.

Prosecutors see themselves as defenders of justice. Their job is stressful because of the power they wield and the consequences of the decisions they must make daily. Their multiple allegiances – to crime victims, to the court, to the public, to a justice ideal, and even to the defendants – necessitate balancing interests that few other jobs require. Even with this understanding of the difficulties of the job, some prosecutors have been known to routinely (sometimes inadvertently but sometimes intentionally) engage in varieties of both large and small scale misconduct. Regardless of the details of the arrangement with the prosecutor's office, clinics struggle to form students' character to avoid misconduct while in law school and beyond. Their clinical teacher is a ghostly whisper in the courtroom or the precinct offering some "Remember me" ad-

vice about judgment, discretion and honor, while the much louder voices of colleagues and supervisors in the prosecutor's office are screaming, "This is the way we do things" or "It's office policy" or "What's your 'win-loss' record?"

C. Becoming a Prosecutor

How do prosecutors learn this careless or even willful behavior? My years as Director of Training and my continuing contacts with colleagues who design and coordinate in-house education of ADAs in New York City provide me with an overview of local practice Every fall, and sometimes more frequently, a group of newly appointed prosecutors are sworn in, receive credentials and begin training programs. Here in New York City, several hundred recent law school graduates attend training programs at the four main local prosecution offices (Brooklyn, Manhattan, Queens and the Bronx).[21] While each county has its own curriculum, all train in the fundamentals. For example, at the Kings County (Brooklyn) DA's Office, the introductory training program covers the following topics in its written materials: Accusatory Instruments, Discovery and Disclosure, Suppression, Search and Seizure, Statements, Identification, Notices, Speedy Trial, Search Warrants, and Courtroom Closure.[22] The contents include long outlines about doctrine, some recent decisions, office policy memos, and occasionally some practice guidelines or pointers that largely focus on

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[21] The New York Prosecutors Training Institute, Inc. (NYPTI), the mutual assistance and continuing legal education division of the District Attorneys Association, provides training and CLE for district attorneys' offices particularly when individual offices, cannot provide training programs because hiring is sporadic and the numbers of new ADAs is small. *See* http://www.nysdaa.org/detail.cfm?page=5 (last visited Dec. 15, 2004). They offer a basic course, a trial skills course and advanced and/or specialized courses, most of which last three to four days. Materials on file with author.

[22] Materials on file with author. In the past year or so, this office has decentralized its training so that these materials have not been updated and the overall format of the program is not uniform throughout the office. I appreciate the generosity of the Brooklyn DA's Office for sharing their materials with our students. This is evidence of the longstanding cooperative relationship we have enjoyed with that office for more than fifteen years.

the issues confronted during the early years of a prosecutor's career.[23]

At each of these large New York City offices, new ADAs attend training sessions that run for about three weeks.[24] All of the programs present a mixture of practical and doctrinal materials, largely in lecture format with occasional variations. On the practical side, there are sessions on reading a rap sheet, case movement, handling a caseload and how to make a proper record in court. On the legal end, there are lectures about the law of speedy trial, substantive crimes and defenses, general and constitutional criminal procedure, and discovery. To one degree or another, the various specialized bureaus in the office provide an orientation to their respective work. The curriculum also includes some skills training. For example, the Bronx sends the group to observe at the "complaint room" and the arraignment and calendar courtrooms, and to conduct mock arraignments. In Manhattan, the group engages in complaint drafting and arraignment exercises. In Queens, the ADAs conduct mock arraignments and suppression hearings. Brooklyn training includes several courtroom advocacy and plea bargaining exercises.

Each program has its own special features. The Bronx includes presentations by the attorney-in-charge of the Criminal Defense Division of The Legal Aid Society, the principal public defender, several judges, community leaders, and victim advocates. These particular sessions range from thirty minutes to one and a half hours. In Brooklyn, Manhattan and Queens, orientation includes field trips to detention facilities, central booking, a patrol car ride-along, a visit to the firing range and a tour of some neighborhoods.

These DA training sessions attempt to offer a general

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[23] Materials on file with author.

[24] In addition to the Brooklyn materials, I have the schedules of the current training programs in Queens and those attended by my students in the NYU Prosecution Clinic who worked in the Manhattan and Bronx offices in 2000-2001. At NYU, students were expected to participate in as many training sessions as their class schedules permitted. Cardozo requires its full-semester students to attend the training program in its entirety.

introduction to their respective offices and seem quite sensibly to focus on the more immediate work the new ADAs will encounter. For example, in the Bronx, they highlight issues in screening misdemeanor narcotics, domestic violence and sex offense cases, as well as vehicle, and traffic and administrative law violations. They also at least try to avoid swamping the group with information about both substantive law and areas of practice they will not encounter until they have been in the office a while, such as grand jury practice, investigations or appeals. None of the programs provide legal or skills training for trials at this early stage. Recognizing that training is an ongoing process, these topics are reserved for other formal training programs, or allowed to be learned on-the-job.

This expedient approach to training makes sense. The offices need to prepare their new generation of prosecutors to be up-and-running as soon as possible. Even if lectures on wide-ranging topics may not be the most engaging pedagogy to teach newcomers fresh from bar review courses, they certainly get a head full of the basics. In a very few weeks, neophyte prosecutors have to move with a pace and confidence that allows them to handle a caseload in court every day. Given this goal, these programs are impressive in the amount of information they pass along in such a short time period.

But a closer look reveals some shortcomings. The training schedules devote a token amount of time, at most a few hours, to one or two lectures on "the role of the prosecutor" and "professional responsibility." Typically, a senior attorney addresses the newly minted ADAs for about an hour about these topics. Presumably the wisdom passed along is informed by that individual's experiences which, in turn, were shaped by earlier generations of prosecutors. Furthermore, an examination of the available materials from the Brooklyn DA's Office, by way of an exemplar, reveals few references to ethical rules or standards.

Take the charging decision, for example. The section on accusatory instruments discusses at great length the legal requirements for a sufficient complaint, but makes no mention of norms regarding the exercise of discretion in the charging

decision, such as those promulgated by the American Bar Association's *Standards for Criminal Justice*.[25] Possibly some of the more obvious underlying principles do surface, such as "A prosecutor should not institute . . . criminal charges in the absence of sufficient admissible evidence to support a conviction."[26] But there seems to be no time allocated to allow for any serious discussion of the content of this standard, or of the criteria that might be employed to exercise discretion. Nor is there any reference to any competing norms by which to make a charging decision. For that matter, it is not evident whether any of the lectures or written materials reference ethical rules of standards found in either the ABA *Model Code of Professional Responsibility*,[27] the ABA *Model Rules of Professional Conduct*,[28] or the *National Prosecution Standards*.[29] A meaningful discussion of these standards should more than just mention the rules. It might attempt to identify subtle normative differences, apply the criteria underlying the standards to typical circumstances where an exercise of discretion might be appropriate and sensitize recent law school graduates to the enormous, and virtually unreviewable, power they now wield, even at the most basic decision making level.[30] There seems to be an unwarranted expectation that the

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[25] ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.9 (3d ed. 1993) (hereinafter ABA STANDARDS)

[26] *Id.* at 3-3.9(a).

[27] MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (A)(1980)("A public prosecutor . . . shall not institute . . . charges when he knows or it is obvious that the charges are not supported by probable cause."). This is the rule followed in New York. N.Y. STATE BAR ASS'N, THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (2002).

[28] MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

[29] NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 130 (2d ed. 1991) (43.3: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial;" 43.4: "The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.").

[30] United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 368 (1978)) ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an of-

momentous transition from student to someone with the ability to change the lives of others is simply a matter of information. The ease of this transformation should not be taken for granted, however. It deserves time for serious reflection about how to structure the exercise of discretion fairly, honestly and consistently.[31]

For several weeks, new ADAs are introduced to the various divisions in the office by their respective bureau chiefs and are trained by senior attorneys. This sends a very clear message. These successful people are role models and icons so their words and perspectives really count. But, aside from describing the structure and work of their respective bureaus, there is no evidence that these individuals actually offer any kind of thoughtful or systematic consideration of the responsibility inherent in their powerful positions. The ABA *Standards* state that, "A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused."[32] Do the lecturers mention the independent thinking that this standard implies? Are they encouraging autonomy or individual judgment? Or, after hearing from the leaders and stars in the office, does the training session become the first step in the homogenization process whereby prosecutors are too insecure or fearful of negative consequences either to exercise personal judgment or to try to defend a recommendation that might conflict with a supervisor?

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fense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'").

[31] I get the impression that most DA offices put a lot of faith in their hiring decisions as a screening tool, but these seem to be unreliable safeguards. Those of us whose students describe the many stages of the interviewing process know about many of the unanswerable hypotheticals about dead witnesses and terrorist cooperators that are thrown at the candidate in an effort to measure their judgment and ability to defend their position. Of course, the students at first feel that they messed up precisely because nothing seemed to be the "right" answer. Then, they hear about the questions from their friends and prepare answers which may or may not reflect their actual views. This is not the most reliable litmus test of character.

[32] ABA STANDARDS, *supra* note 25, at 3-3.9(b).

Similar questions could be asked about any of the other stages in a criminal case in which prosecutors exercise discretion or use personal judgment to make decisions unburdened by clear legal mandates. Even the most junior prosecutors make daily decisions concerning bail requests, plea offers, and sentence recommendations. Quickly, these decisions are wholly delegated to inexperienced lawyers who, given the volume of their caseload, are supervised superficially at best. Vigilant oversight over all ADAs in a large office is impossible, thus allowing habits, expectations, attitudes and even demeanor to develop, without opportunities for feedback that might lead to change or adjustment. It is likely also that self-reflection is not a process that is even identified, let alone valued. Furthermore, since there are few effective deterrents, and even fewer sanctions, in cases of arguable or actual abuse or impropriety, most prosecutors learn that their behavior is largely self-monitored unless it is so egregious as to draw "front office" or public attention.[33]

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[33] Prosecutors are immune from civil lawsuits for abuse or misconduct committed during the course of the investigation or adjudication of a case. Imbler v. Pachtman, 424 U.S. 409, 430-37 (1976). While state prosecutors are subject to professional discipline, few examples of meaningful intervention are available. *See generally*, BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14:12, 542-43 (2d ed. 2004); Fred C. Zacharias, *The Professional Discipline of Prosecutors,* 79 N.C.L. REV. 721 (2001); *Texas Bar Goes After Tulia Prosecutor*, WASH. TIMES, Apr. 9, 2004, *available at* http://washingtontimes.com/upi-breaking/20040409-094527-4610r.htm (last visited Feb. 12, 2005) (reporting the conviction of forty-six people on narcotics charges based on evidence known by the prosecutor to be false that was developed by an undercover officer whose arrest record was known to, but not disclosed by, the prosecutor). Moreover, there is controversy over which entity has the authority to discipline federal prosecutors: the Department of Justice, the state of the attorney's admission, or the state in whose federal courts the AUSA is practicing. The literature on this topic is considerable, and beyond the scope of this essay. *See, e.g.,* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923 (1996); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996). Now, The Citizen's Protection Act has codified the question. 28 U.S.C. § 530B (Supp. 2004); 28 C.F.R. § 77.4(f) (2004).

Other potential remedies include criminal prosecutions, court sanctions (*e.g.*, contempt), reversal (with or without identifying the individual involved) or inter-

The training materials are wholly practical and concrete. They reflect the needs of the office to have prosecutors who "will promptly start functioning as lawyers, not apprentices."[34] The written materials contain no articles or other commentary about prosecutorial discretion or ethics. None of the provocative literature on race in the criminal justice system are included.[35] Another gap is the absence of materials related to values inherent in interviewing, negotiation and fact investigation, to name a few of the obviously relevant tasks prosecutors employ on a daily basis. For example, there appears to be no systematic consideration of honesty and deception in the conduct of discovery or plea bargaining.

Most offices treat training as an ongoing responsibility

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nal discipline.

> The court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988). A recent case exposed the justified cynicism of this course of action. A defense attorney, who won a $5 million dollar settlement for his client who had been wrongly imprisoned in a rape case as a result of the prosecution's failure to disclose exculpatory material that would have led to acquittal, conducted a study claiming to reveal that prosecutors in the Bronx DA's office were rarely, if ever, sanctioned for their professional misconduct. Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price: Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES, Mar. 21, 2004, at 25. Publicity, of course, draws attention to problems but may not achieve any actual reform. For example, the Chicago Tribune ran a five day series covering thirty-six years of cases in which prosecutors suppressed exculpatory evidence or knowingly used false evidence. *See supra* note 8. A very modern method of surfacing misconduct is the website or blog, of which there are several dedicated to embarrassing rogue prosecutors. *See, e.g.*, Carl E. Person, *Prosecutorial Misconduct Website—To Expose Prosecutorial Corruption and Related Loss of Constitutional Rights and Report on Relevant Cases Imposing Liability for Prosecutorial Misconduct*, *available at* http://www.lawmall.com/abuse (Oct. 6, 2004); Mark A.R. Kleiman, *The Decline of Prosecutorial Ethics*, *available at* http://www.markarkleiman.com/archives/crime_control_/2003/09/the_decline_of_prosecutorial_ethics.php (Sept. 1, 2003).

[34] Richard H. Kuh, *Careers in Prosecution Offices*, 14 J. LEGAL EDUC. 175, 179 (1961).

[35] *See infra* note 59.

but their advanced programs tend to focus on substantive law (for example, narcotics or domestic violence), particular aspects of prosecution (for example, grand jury practice, search warrants), or trial skills in a setting that is self-perpetuating and unselfcritical. For example, the emphasis on trial skills is ironic since few cases actually survive plea bargaining to be tried, while no training seems to examine closely that plea bargaining process from either moral, ethical, or skills perspectives. The process seems foregone: the choice of discussion topics, reading materials, strategic tips and pointers and anecdotal information is presented by more senior prosecutors who themselves were trained by the same method probably only a few years earlier.[36] Again, the instructors are drawn from within the office so, however well-intentioned and comprehensive their program design for their purposes, basically they bring to training not much more than their own knowledge, experience and perspective.[37]

After this orientation, most novice ADAs start to appear in court, make bail arguments, engage in plea bargaining and churn the thousands of misdemeanor cases that flood the metropolitan area criminal court system.[38] As they gain confidence and proficiency, as they move up the ladder in the office

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[36] It is unlikely that seasoned prosecutors will question the values and mores they follow since to do so would undermine their identities. For that reason, collegial consultation is likely to yield little critical reaction, confirming rather than challenging long-held points of view. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 248 (1988).

[37] I make this comment with all due respect for the hard work, energy, commitment and thoroughness of the people responsible for training in DAs' offices today where prosecutors receive a quality of training far superior to what was offered when I started. For example, then conventional wisdom included tips about jury selection that were distasteful, to say nothing about now being unlawful under *Batson v. Kentucky*, 476 U.S. 1712 (1986). I remember reading some materials that advised picking Con Edison workers because they were "law and order" jurors, whereas social workers were to be avoided at all cost. Despite these improvements, training and supervision could benefit from an even greater emphasis on role and role conflict. Fisher, *supra* note 36, at 257-58.

[38] In New York City, in the three-month period of January to March 2004, there were 23,130 felony arrests. *N.Y. State Div. of Criminal Justice Servs.*, *at* http://criminaljustice.state.ny.us/crimnet/ojsa/cj082604.htm (last visited Dec. 16, 2004).

structure, prosecutors continue their transformation.

I assume that most ADAs are hard-working, well-intentioned and begin their careers as idealists. Then, a seemingly inevitable pressure to conform grabs hold. Perhaps individuals who want to be prosecutors are susceptible to organizational thinking so that their soil is prepared for these tendencies to take root. There are undeniable pressures to analyze issues from a prosecutorial perspective that the newcomer, eager to thrive in this environment, might have trouble resisting. These pressures likely lead them to be conservative or "tough," and to take few risks in fear of actual or perceived problems. Sooner or later, many ADAs succumb to the imperatives of the adversary system. They begin to keep score of their win-loss record,[39] to treat defense attorneys as untrustworthy enemies, to see the world in absolute terms populated by bad guys or 'skells,' to judge people as types rather than individuals, to become fearful of being too lenient lest generosity backfire or superiors object,[40] to develop an air of arrogance or self-righteousness, to read the law in the light most conducive to prosecution and conviction rather than fairness and justice, and to become inured to the punitive and retributive quality of today's criminal justice system.

These are only a few of the attributes that characterize the metamorphosis of most prosecutors as they learn the language and mores of their environment. For some ADAs, power interferes with justice. There are simply too many examples of

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[39] "Prosecutors' idea of justice is a guilty verdict . . . ." Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 284 (2001); *see also* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996).

[40] *See* Roscoe C. Howard, Jr., *Changing the System from Within: An Essay Calling on More African Americans to Consider Being Prosecutors*, 6 WIDENER L. SYMP. J. 139, 158-59 (2000). The author describes a situation in which a young AUSA refused to charge a defendant because the police did not have the necessary probable cause. After flouncing off to the supervisor, the detective had a tantrum, throwing the file on the floor, refusing to work with the AUSA again. *Id.*

impropriety, misconduct and even illegality to ignore. Not everyone changes, of course, but as Professor Abbe Smith forcefully asks, given the many internal and external forces and influences at work, "Can you be a good person and a good prosecutor?"[41]

D. Can a Prosecution Clinic Make a Difference?

Professor Smith answers her own question, "I hope so, but I think not."[42] I would like to urge those of us who teach prosecution clinics, many of whose students spend years and sometimes an entire career in prosecution, to strive for a more hopeful legacy. Whether we directly supervise students or indirectly monitor their field placements, we should communicate a clear and lasting vision of the public prosecutor that endures and withstands the foreseeable pressures toward institutional acculturation. In these clinics, we have to measure to what extent our visions of justice and of the role of the lawyer, and more particularly the role of the prosecutor (often formed during our own days as prosecutors), can and should inform our supervision of the law student ADAs. Assuming that we take on this task, we also must figure out how to assure that our influence can survive the peer pressures of most prosecution offices.

While our students are under our tutelage, we can surely provide counter-examples or contrasting views, even as devil's advocate. We can intervene and try to influence their thinking by engaging them in active participant observation. While most of us see our teaching as including critique and reflection about roles and systems, here we may have to push beyond balanced examination or neutral questioning to directly challenge our students' experiences just to provide a counterweight against the very directive messages delivered by the DAs' offices. If we see at least part of our role to be teaching our students to think independently and creatively, and even

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[41] Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14. Geo. J. Legal Ethics 355 (2001).

[42] *Id.* at 396.

more nettlesome, to question the validity of the institutional values themselves, we have to decide whether our teaching should be expressly (and, if necessary, subversively) designed to influence our students in prosecution jobs after graduation when they are making choices and decisions about how to investigate, gather evidence, comply with court orders or constitutional mandates, examine witnesses, deliver summations and all of the other activities in which prosecutors engage. We should motivate them so that at their ten-year reunion, they can report a good score on their "doing justice" report card.

This activist role could be accomplished in two distinct ways. First, use readings and discussion to surface issues about role and responsibility. Assign the students challenging articles instead of, or at least in addition to, task-oriented materials such as a DA Office training materials, outlines of caselaw or even readings about advocacy skills. Require them to read all relevant ethical rules, and then articles that critique them. Pay attention to topics that are less work-centered, and therefore not as immediately useful, but more overarching, including writings about defense attorneys, race and role. For a clinician, this may sound too much like a traditional class. Normally I would not advocate that such a substantial proportion of clinic seminar time be devoted to conceptual material, but in this instance, this may be the last best opportunity for the students to engage neutrally and without professional consequences in these topics.[43] Second, design problems and simulations that introduce some of the standard pot holes to force the students to deal with examples of the reported missteps and misconduct of prosecutors as well as the less egregious habits that might be fostered by office culture.[44] Make students experience the decision making process

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[43] Frankly, I am not even sure this is possible. So many students in prosecution clinics hope for jobs in these offices that they might worry about the consequences of being overly critical of a potential future employer.

[44] For example, ADAs in New York routinely are instructed to avoid writing down information gleaned during witness interviews because these statements are discoverable at trial and might be used to impeach. N.Y. CRIM. PRO. LAW § 240.45 (McKinney 2002); People v. Rosario, 9 N.Y.2d 286 (1961); *see also* 18

in the tough call, and then deal with the reactions of others to their choices. Do not rely solely on the clinic's own cases since they are unlikely to raise the full gamut of issues calling for exercises of judgment, discretion or imposition of individual norms. These suggestions are hardly revolutionary, and surely are part of any well-constructed clinic curriculum. But in the context of prosecution clinics, I think the choice of materials and problems has to be even more sharply and deliberately committed to stirring, churning, confronting and challenging the hollow assumptions and cliches that most prosecutors use to describe their roles such as "seeking justice" or "public lawyer."[45] Also, since prosecution clinic instructors usually are former, or even current, prosecutors themselves a part of, or emerging from, that culture of conformity where training and supervision are task and resulted oriented, we have to work even harder to be imaginative in order to foster an enduring critical perspective.

Most clinical curricula are organized chronologically according to case development. We begin with interviewing, work through case theory and fact development, counseling, negotiation, and, in a litigation clinic at least, finish with advocacy, both written and oral. In the prosecution clinic, the road map would start with the charging decision (substantive law, interviewing witnesses, drafting) then move to plea bargaining (negotiation), pre-trial motions (procedural law, drafting) and hearings and trials (oral advocacy). There are ample readings in statutes, skills literature, and doctrinal treatises,

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U.S.C. § 3500; FED. R. CRIM. P. 26.2. This admonition always impressed me as foolish. First, so few cases are actually tried that the risk is minimal, while the loss of information due to a failure to memorialize the fact is quite likely given the typical large caseload. Also, if the witness' testimony were slightly inconsistent, a competent prosecutor should be able to remediate the problem unless it was a substantial inconsistency, in which case the ADA should be reexamining the veracity of the witness, and perhaps the prosecutability of the case altogether.

[45] Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 835-41 (2000); Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM L. REV. 607 (1999); Alan Vinegrad, *Prosecuting for the Public Interest*, STUDENT LAW. 17 (Mar. 2002).

and plenty of commercial simulation materials, as well as materials prepared by the instructor, to fill the entire year's classroom sessions.

We surely want our students to be familiar with the legal principles central to the prosecutor's job concerning such matters as the obligation to disclose exculpatory material and racially neutral jury selection. But this approach adds nothing to the standard training an ADA ultimately will receive. Despite the risk of overload, we need to incorporate another level of discourse, even if this leads to extra class hours and readings that might seem disconnected and acontextual to the students who are busily engaging with the real world of cops, victims, defendants and judges. By third year they are exhausted by the classroom and raring to get in the trenches. And, when they return to school they only want to talk about their colorful first-time experiences. We have to resist this urge. In order to plant and fertilize the seeds of skepticism, introspection and individualism they have to return to school with all of their colorful stories and turn all of these impressions into big-picture thinking. To do this, we need to identify and then assign thoughtful readings and provocative exercises designed to have them learn not just how to be effective according to prevailing DA office norms, but how to be conscientious, critical and humanitarian. For a clinical teacher to oppose this urge for real-life experience seems contrary if not downright anti-clinical.

While I have never assigned most, and certainly never all, of the readings in the notes accompanying this section, I have read them all, as I urge all prosecution clinic instructors to do, if you have not already, just to keep ourselves teaching on a level that moves beyond the practical agenda of a training program. I have set forth below some suggested topics and the accompanying footnotes constitute a brief bibliography of articles that might serve as starting points for the prosecution clinic instructor.[46]

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[46] The list is not exhaustive, but rather a starting point. Fortunately, this symposium issue provides all of us the opportunity to share ideas and resources.

1. Moral Development

Prosecution clinic students can begin the year by identifying their values. What do they individually see as the goal of their job: punishment, deterrence, incapacitation, rehabilitation? Those concepts, philosophical and abstract during the first week of Criminal Law class, by now have been buried in the pile of information and skills the students learned in Criminal Procedure and Trial Advocacy classes. And they surely will not be revisited in DA office training programs. Individual attitudes about charging decisions, plea bargaining and sentencing are informed by a personal moral philosophy, but most ADAs are functioning on too practical a level to realize what drives them. Just as some clinicians use psychological testing like the MBTI at the beginning of the semester to alert students to learning and working styles,[47] the prosecution clinic could begin with a series of fact patterns and exercises to elicit values and, if possible, a moral framework.[48]

Discretionary decision-making, the core prosecution function, requires constant use of moral judgment. Ethical standards refer to personal beliefs about probable cause and guilt, but give no guidance about how to make these judgments. Can the process be anything other than personal and subjective, especially in an office where there are no published policies but decisions are based on the collective, historical wisdom of peers? How do prosecutors learn to assess conduct, whether to treat individuals similarly or differently and on what basis, what criteria to use, how to relate to people from other cultures or who have different attitudes or goals for the prosecu-

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[47] Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169 (1990) (advocating the use of MBTI to enhance the learning in clinical settings); *see also* Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63 (1995).

[48] Bennett Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993). This is a very useful article because it contains three well-developed hypothetical charging decisions in situations of moral ambiguity.

tion?[49] Is their judgment simply informed by convention – established norms or rules – or can they engage in more diverse and inclusive moral reasoning? How can a prosecutor "do justice" without considering a host of values apart from conviction (or the more pragmatic, convictability) and punishment?

2. The Essential Values of the Job and the Person Doing the Job

At the beginning of the year, students can generate lists of the characteristics and core values of their vision of the prosecutor they hope to become. What might be included? Students might list discretionary decision making, truthfulness, honesty, obedience to legal principles, respect (for victims, for defendants, for rights, for other participants in the system) imagination, neutrality, fairness and diligence. By identifying these values at the outset, before their ideals are tested by the reality they encounter, students can refer to this baseline reading to compare reality to their expectations, to measure personal adaptations and to chart what events or interactions caused them to change.[50] Many useful articles

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[49] There is considerable literature about prosecutorial discretion. *See generally* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 4-9 (1971); Gershman, *supra* note 48; Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669; Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM REV. 1151 (2000).

[50] Many of the readings that might provoke introspection and discussion have titles that articulate values. For example, prudent, virtuous, ethical and neutral are common adjectives. *See, e.g.,* Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in Passionate Pursuit*, 68 FORDHAM REV. 1695 (2000); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973). There are many other articles that raise a host of normative issues, any one of which could stimulate provocative discussion. *See, e.g.,* Bennett L. Gershman, *The New Prosecutors,* 53 U. PITT. L. REV. 393 (1992) (former ADA, New York County); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 22 CARDOZO L. REV. 829 (2002); Green, *supra* note 45; Laurie Levenson, *Working Outside the* Rules*: The Undefined Responsibilities of Federal Prosecutors,* 26 FORDHAM URB. L.J. 553 (1999) (former AUSA in C.D. Cal.).

written by former prosecutors – Bennett Gershman, Bruce Green, Richard Uviller – draw on their own moral development during their time on the job to describe and proscribe many issues.

3. Exploring the Honesty-Deception Continuum

There are many occasions when prosecutors make personal moral choices because legal doctrine gives them little clear guidance and a lot of latitude without much accountability. When the law itself may be insufficiently specific about how to implement its requirements or prohibitions, the true colors of a prosecutor will be revealed. Of all the examples of such crossroads, the duty to disclose exculpatory evidence is one of the hardest roads to travel without losing sight of the core value of fairness. In law school, this duty seems crystal clear at first: disclosure is required. Every student knows about *Brady* material, even without taking Criminal Procedure.[51] But Supreme Court case law permits a lot of leeway. Since the legal standards are applied post-conviction,[52] and courts do not provide much guidance except in specific categorical instances, for example, disclosing promises to induce testimony,[53] prosecutors have lots of latitude to decide whether certain facts would, if known to the defense, have altered the outcome of the trial.[54] Most students do not know that vari-

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[51] Brady v. Maryland, 373 U.S. 83 (1963)

[52] United States v. Bagley, 473 U.S. 667 (1985).

[53] The duty to disclose includes impeachment material. Giglio v. United States, 405 U.S. 150 (1972). Although state rules may differ and impose more demands on the prosecutor, in federal prosecutions, the Supreme Court has curtailed this obligation by refusing to require disclosure of exculpatory evidence applicable outside the trial. United States v. Ruiz, 536 U.S. 622 (2002) (holding no duty to disclose impeachment material before guilty plea); United States v. Williams, 504 U.S. 36 (1992) (holding no duty imposed by United States constitution to disclose of exculpatory evidence to grand jury). Because so few cases actually go to trial, the temptation to withhold helpful evidence in order to obtain a guilty plea is almost irresistible.

[54] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997).

ous ethical rules impose much stricter obligations to disclose.[55] Nor are they aware of alternative approaches from other legal systems.[56]

Forcing students to decide how to handle specific situations by providing rich and nuanced fact patterns, and enabling them to see how others might see their choices and conduct, may provide them with a conscience to honorably handle decisions in an office where disclosure may be seen as tantamount to jeopardizing the conviction, and where reversal in a universe of harmless error might seem worth risking. Years ago, a former mentor provided me with the test I found most applicable.[57] He called it the "Ouch Standard." In other words, if the reason you are considering withholding information is that it will hurt your case, then you should tell the defense even if non-disclosure actually might not be sufficiently prejudicial to warrant reversal. Our goal as teachers should be to implant the kind of advice our students never will forget.

In order to awaken students to potential for misconduct or

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[55] MODEL RULE OF PROF'L CONDUCT, *supra* note 28, at 3.8(d), mandates a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilty of the accured or mitigates the offense . . . ". ABA STANDARDS, *supra* note 25, at 3-3.11(a), states: (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged . . . ." These rules are more expansive in both scope and timing than federal constitutional law, a difference about which the students should be informed, particularly if state ethical sanctions could apply.

[56] Our students should be made aware that the U.S. system is markedly different from most other countries, and international tribunals, which require disclosure of all evidence, and certainly exculpatory evidence, pre-trial, irrespective of its probative value. *See, e.g.*, Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 FORDHAM L. REV. 1379 (2000); *see also* Rome Statute of the International Criminal Court, Art. 67(2), U.N. GAOR, 53rd Sess., U.N. Doc. A/CONF. 183/9 (1998)("[T]he prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.").

[57] My mentor was Honorable William C. Donnino, formerly Chief Executive of the Brooklyn DA's Office, who now sits as a Justice of the New York State Supreme Court (the trial court).

abuse, we can work with the established track record of prosecutors. By reviewing examples of misconduct that have been adjudicated either on the appeal of a conviction or in the occasional litigation before an ethics board, students can learn about both the inadvertent and the intentional misdeeds of prosecutors during pre-trial discovery, plea bargaining or trial. These reported decisions can be converted into problems asking, "What would you do in this situation?"[58] This provides plenty of opportunity to contrast their decisions with the conduct of the actual prosecutor. The instructor also can ascertain each student's moral barometer in comparison between the other students in the class and the group's non-situational expectations. What the student might do when confronted by the hypothetical, and the reasons given for the choice, may be glaringly different from the same considerations in reality.

4. What Are Scholars Saying?

After graduation new prosecutors eager to jump into the courtroom, the grand jury or the precinct gladly leave abstract, impractical scholarship and new theories about crime and criminal justice in the classroom. While it is true that some ideas may seem utopian or conceptual, the habit of critical thinking and openness to new ideas is an important routine that prosecution clinic instructors can instill by introducing some of the more current scholarship about, for example, racialized justice,[59] community prosecutions,[60] or therapeutic

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[58] Often these decisions are contextual and subjective, easily defended by the prosecutor whose judgment is being challenged. *See* Medwed, *supra* note 8. By using real examples that resulted in either reversal or disciplinary proceedings, students can measure their instincts against the actual decision. A quick LEXIS search exposes examples of questionable conduct during pre-trial proceedings, grand jury presentations and investigations, in dealing with witnesses (coaching, isolating, berating), and at trial (witness examination, comments during summation).

[59] *See, e.g.*, Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

[60] *See, e.g.*, Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465

approaches to adjudication.[61] Surely, any prosecutor, even a student hoping to be one someday, would find the proposal to use financial incentives to influence prosecutorial discretion controversial, thus prompting a spirited discussion of whether and how misconduct and abuse can be curtailed.[62] The hallmark of clinical education is reflective practice, so we should resist the lure of the real world and insist on maintaining a symbiosis between the practical and the theoretical. This may seem an obvious observation, but we all know the excitement the cases, clients and controversies can engender and how tempting it is to divert all discussion to these events. Resist this impulse, even if it seems antithetical, in other words, anti-clinical. The long term benefits in the struggle against prosecutorial acculturation will be substantial even if not immediate.

Another strategy to raise consciousness is the promotion of student scholarship. The deeper exploration of an issue that scholarship engenders can stimulate a student to think critically and creatively about the norms and behavior of prosecutors. And, if they go on to work in a DA's office they will import a broader view of general issues as a result of their scholarship. A notable example of this phenomenon is Professor Bruce A. Green of Fordham, whose guidance is acknowledged in an impressive number of student notes on a wide range of topics relating to prosecution.[63]

(2002); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

[61] In New York, there are many innovative "problem-solving" courts which DAs offices have been instrumental in establishing, and generally have embraced enthusiastically, resulting in very different approach to prosecution. *See* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125 (2001).

[62] Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995). Most prosecutors would scoff at the impracticality of Professor Meares' ideas, but such a reaction makes this article all the more provocative and stimulating.

[63] *See, e.g.*, Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987 (1995); Rebecca B. Cross, *Ethical Deception by Prosecutors*, 31 FORDHAM URB. L. J. 215 (2003); Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theo-*

5. Personal Accounts

Many prosecutors, and even law professors or journalists taking a career detour in a prosecutor's office, have written accounts of their experiences as a means of exploring the complexities of the criminal justice system and the prosecutor's own contributions in popular literature. In general, they represent an example of reaction and reflection for our students, particularly for a clinical setting where students are required to keep journals.[64] Have students read some of these books and encourage them to critique the viewpoint, observations and conclusions of the authors.[65]

6. Parallel Universes

Our students need to be educated to think about how prosecutors fit into the larger picture of the other participants in the criminal justice system. Too often defense attorneys are demonized or disrespected without any real understanding about the difficulties and challenges of *their* role. Unfortunate-

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ries of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?, 68 FORDHAM L. REV. 525 (1999); Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245 (2000); Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205 (2000).

[64] Journals are an accepted form of clinical pedagogy, particularly in externship programs. J.P. OGILVY ET AL., LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL INTERNS 97-111 (1998); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996). Imagine if a student journal could be converted into a bestseller? *See, e.g.*, JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER (1983).

[65] *See, e.g.*, MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS (1999); MARISSA N. BATT, READY FOR THE PEOPLE: MY MOST CHILLING CASES AS A PROSECUTOR (2004); GARY DELSOHN, THE PROSECUTORS: A YEAR IN THE LIFE OF A DISTRICT ATTORNEY'S OFFICE (2003) (The author is a reporter with the Sacramento Bee) DAVID HEILBRONER, ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A. (1990); GARY T. LOWENTHAL, DOWN AND DIRTY JUSTICE: A CHILLING JOURNEY INTO THE DARK WORK OF CRIME AND THE CRIMINAL COURTS (2003) (The author is a professor at Arizona State University Law School); JEANINE PIRRO & CATHERINE WHITNEY, TO PUNISH AND PROTECT: A DA'S FIGHT AGAINST A SYSTEM THAT CODDLES CRIMINALS (2003) (The author is the District Attorney of Westchester County, New York); STEVEN PHILLIPS, NO HEROES, NO VILLAINS (1977).

ly, it seems that the level of mutual distrust and even contempt is apparent regardless of geography. Yet many adversaries actually are former classmates who have more in common with each other than with their clients, the police or crime victims. In addition to reading works by thoughtful defense attorneys,[66] the clinic offers the incomparable opportunity for incipient prosecutors to think and act like defense counsel when conducting role-plays in class.

Other differences should be highlighted as well. In any court, but particularly one in a metropolitan area, ADAs deal with people from other countries, who communicate in languages other than English and whose cultural differences may affect their ability to testify (or to testify effectively) or to understand their choices (whether as victim or defendant) or whose backgrounds may inform the actual criminal conduct. In many clinics, themes of difference and cross-cultural issues have become staple parts of the curriculum. There is ample literature to assign.[67] Similar 'cross-cultural' education could be offered about mental illness, alcoholism, drug addition and other behaviors that play a large part in the criminal justice system.

7. Agent Provocatateur

Clinical teachers never suffer from a shortage of provocative questions designed to encourage students to think independently, imaginatively and confidently. We try to produce

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[66] *See, e.g.*, Albert J. Krieger, *Why I Am a Criminal Defense Lawyer*, STUDENT LAW. 22 (Mar. 2002); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271-94 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004).

[67] Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

problem-solvers. During supervision class discussion, and in role plays, we can raise the tough questions that few full-time prosecutors ever consider in order to motivate students to develop their own answers to normative questions about role, to instill instincts that question complacency, and to encourage individuality. For example, how should prosecutorial misbehavior be treated within the DA's office? What kind of accountability should exist when misconduct occurs? By what means can an ADA develop a reputation for honesty and credibility? What adjectives would each student choose to describe themselves as prosecutors? Is it possible to achieve individualized justice in overcrowded courts? How do others experience the criminal justice system? Even if the law does not prohibit lack of candor, should prosecutors be required to tell the truth or at least not deliberately deceive an adversary? Would you let a guilty man go free to attain an abstract principle of justice? Can you defend strategic over-charging? Are there any personal values or biases that you inject into decision-making about cases? How far would you go to secure the cooperation of a recalcitrant witness?

This list, which surely asks only a few of the limitless questions that should be, but rarely are, asked by working prosecutors, is a starting point for clinicians to seize the opportunity to poke, prod and provoke our prosecution-minded students while we can. Those clinics that see their purpose as comprising more than teaching advocacy skills already ask about power, authority, boundaries, values and ethics.[68] All

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[68] For example, at Boston College Law School, the Prosecution Program course description asks:

> What is the primary task of a prosecutor? Enforcing the law? Securing convictions? Punishing offenders? Seeking justice? Even if we agree that a prosecutor's primary task is to seek justice, will we be able to articulate a shared notion of what "to seek justice" means? One of the central challenges that students will face in this clinic will be to understand and articulate the primary task of a prosecutor and how our notions (both conscious and unconscious) of authority, role, boundary, and task affect the way we take up our role.

Boston College Law School Course Descriptions, *available at* http://www.bc.edu/schools/law/services/academic/programs/curriculum/courses/list/#descriptions (last visit-

seventy-six schools with prosecution clinical offerings address these issues in order to launch our students on a career that will not include or suffer prosecutorial misconduct.

8. Clinical Resources

My last observation about the challenges these clinics pose concerns their staffing. Since prosecution clinics cannot exist without the cooperation of prosecution offices, for most law schools concerned about conserving clinical education resources, the obvious and efficient decision has been to rely on externships rather than to hire full-time clinical faculty. Thus, supervision is largely in the hands of ADAs and AUSAs with only light faculty oversight. Although it is not always possible to discern who teaches prosecution clinics, on the basis of my on-line survey, I think it is fair to state that the great majority of prosecution clinics are either co-taught or wholly taught by the prosecutors themselves. This arrangement may preclude truly open, critical discussions either during supervision or in class for the same reasons discussed above.[69] There has to be more faculty involvement as either supervisors or seminar teachers in order to create a safe space for students to critically question their work, their observations of the work of others and the role of prosecutor altogether. Moreover, it takes a firm and veteran instructional hand to resist the ineluctable temptation to discuss cases and share experiences descriptively rather than critically.

E. Conclusion

Clinical faculty teaching prosecution clinics must look beyond doctrine and skills. While in the clinic we need to awaken and inspire in our students the critical facilities they will need to prosecute with the highest level of self-awareness. Even more critically, we must prepare those students who go on to careers as prosecutors to resist the adaptation to office

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ed Feb. 14, 2005).

[69] *See supra* Part B.1.

norms that allow for mindless adversarialness, and even to try to break the mold. They should not allow themselves to be viewed by their colleagues negatively, as iconoclasts or rebels; they should be thoughtful, informed and brave, arousing admiration not censure. We can encourage and push them to be "good prosecutors," as we sit as a conscience on the shoulders of our students both during law school and beyond.

PROSECUTION CLINICS: DEALING WITH PROFESSIONAL ROLE

Peter A. Joy[*]

Today prosecutors have an extensive domain and are regarded as potentially, if not in reality, the key actor in the criminal justice system.[1]

The chief objection to prosecutorial discretion is that it has traditionally been unstructured and largely uncontrolled. The result is that the individual prosecutor has, in large part, not been accountable for many of his actions either within the office, or with respect to other sources of public policy and law.[2]

The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged.[3]

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[*] Professor of Law and Director of the Criminal Justice Clinic, Washington University School of Law in St. Louis. Special thanks go to Professor Hans P. Sinha, Director of the Prosecutorial Externship Program at the University of Mississippi, who organized the Prosecution Externship Clinic Symposium, and to the editors and staff of the *Mississippi Law Journal* for publishing the special symposium issue on the subject of prosecution clinics.

[1] *William F. McDonald, The Prosecutor's Domain, in* THE PROSECUTOR 15, 19 (William F. McDonald ed., 1979).

[2] John Jay Douglas, *Introduction and Overview* to DISCRETIONARY AUTHORITY OF THE PROSECUTOR 1, 1 (John Jay Douglas ed., 1977).

[3] *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

INTRODUCTION

Extensive power, largely uncontrolled discretion, and the need to reign in partisan advocacy are three overarching issues implicit in the role of prosecutors. In theory, the criminal justice division of labor confines prosecutors to instituting criminal actions against alleged wrongdoers, while police have the power to enforce the laws through crime detection and prevention, a judge or jury decides questions of guilt, and judges determine the appropriate sentences for those found guilty. In reality, that is not how it works. Today, prosecutors decide whom to prosecute, what crimes to charge and decide, or at least greatly influence, what the sentence will be through their charging decisions, plea bargaining, or sentencing guideline choices.[4] Depending on the jurisdiction, a prosecutor's office may direct investigative and police work, provide special services for victims and witnesses, play an active role in parole decisions, and lobby the state legislature.[5] In the modern conceptualization of the role of the pros-

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[4] Some of the power of state and federal prosecutors to control sentencing through the use of mandatory sentencing guidelines has been curtailed by recent Supreme Court decisions. *See* United States v. Booker, 125 S. Ct. 738, 756-57 (2005) (holding that the federal sentencing guidelines are not mandatory but rather advisory unless the facts necessary to enhance a sentence are admitted by the defendant or proven beyond a reasonable doubt at trial); Blakely v. Washington, 124 S. Ct. 2531, 2543 (2003) (invalidating state sentencing guidelines that permitted prosecutors to enhance punishments without proving to a jury the facts essential to the punishment); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that any increases in the penalty for a crime must be charged and proven beyond a reasonable doubt at trial).

[5] *See* McDonald, *supra* note 1, at 17. Professor Bennett Gershman, himself a former prosecutor, notes:

> As any informed observer of the criminal justice system knows, the prosecutor "runs the show." The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution. The prosecutor effectively has the power to invoke or deny punishment, and in those jurisdictions that authorize capital punishment, the power literally over life and death.

Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 405 n.74 (1992).

ecutor, the prosecutor wields enormous influence and power over the lives of defendants, victims, and witnesses. In some jurisdictions, prosecutors even control the court calendar, thereby affecting the schedules of defense lawyers, judges, and court personnel.[6] And, prosecutors wield this power with very few controls on their exercise of discretion over the choices they make.

The ostensible counterbalance to the extensive power of prosecutors is the concept that prosecutors have ethical obligations that are "special,"[7] requiring a prosecutor to "seek jus-

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[6] *See* McDonald, *supra* note 1, at 17.

[7] Rule 3.8 of the American Bar Association (ABA) Model Rules of Professional Conduct is entitled "Special Responsibilities of a Prosecutor," and it contains six provisions that discuss a prosecutor's ethical obligations to: 1) refrain from prosecuting a charge not supported by probable cause; 2) make reasonable efforts to assure the accused has been informed of the right to counsel and opportunity to obtain counsel; 3) refrain from seeking waiver of pretrial rights from an unrepresented accused; 4) make timely disclosure of all evidence and information that tends to negate the guilt of the accused, mitigates the offense, or mitigates the sentence; 5) refrain from subpoenaing a lawyer to present evidence about a past or present client except in very limited instances; 6) refrain from making extrajudicial statements that have a likelihood of increasing public condemnation of the accused and prevent police and other law enforcement officers from making such statements. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002) [hereinafter MODEL RULES]. The ABA adopted the Model Rules in 1983 and has amended them frequently, most recently in 2002 and 2003. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 4-6 (2005 ed.). The Model Rules replaced the ABA Model Code of Professional Responsibility (Model Code), which the ABA adopted in 1969 and amended in 1980. MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE]. Disciplinary Rule 7-103 of the Model Code contains two provisions outlining the ethical obligations of a public prosecutor or other government lawyer: 1) to refrain from instituting criminal charges not supported by probable cause, and 2) to disclose evidence to the defendant "that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." *Id.* DR 7-103.

The Model Rules greatly influence state ethics rules, with forty-three states and the District of Columbia having adopted some version of the Model Rules. *See* GILLERS & SIMON, *supra*, at 3. Iowa, Nebraska, New York, Ohio, and Oregon have some version of the Model Code, and California and Maine have their own rules that are not based on either the Model Code or Model Rules. *Id.*

tice."[8] Unlike other lawyers who may focus on pushing a client's interests above all other interests, the prevailing belief is that prosecutors are governed by extraordinary ethical requirements that require them to act differently from criminal defense or civil lawyers.[9] Thus, ethics rules require a prosecutor to view his or her role not as an advocate focused on winning each case, but rather as a "minister of justice" with the responsibility to ensure that each person accused of a crime "is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[10] Although these ethical proscriptions may sound meaningful, in reality the ethics rules provide little guidance to prosecutors on how to maintain professional objectivity and a concern for procedural justice above all else.[11] As a result, prosecutorial misconduct sometimes leads to wrongful convictions.[12] Recent studies even show that prosecutorial misconduct is a major factor for rever-

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[8] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

[9] *See infra* Part II.A.

[10] MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

[11] *See, e.g.,* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573 (noting that ethics rules provide little guidance for prosecutorial decision making); Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453 (2000) (contending that ethics rules lack specificity and provide little guidance concerning a prosecutor's duty to be an advocate or minister of justice).

[12] Grand jury and journalistic investigations reveal that prosecutorial misconduct accounts for a large number of wrongful convictions. *See, e.g.*, Ken Armstrong & Maurice Possley, *Trial & Error: The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1 (reporting on a study that showed that since 1963 "at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false"); Barry Tarlow, *Some Prosecutors Just Don't Get It: Improper Cross and Vouching*, THE CHAMPION, Dec. 2004, at 55, 61 (citing a 1990 report by the Los Angeles County Grand Jury that "prosecutors' and investigators' systematic misuse of jailhouse informers caused wrongful convictions in as many as 250 major felony prosecutions between 1979 and 1988").

sals in capital cases,[13] where one might expect prosecutors to go to great lengths to assure each defendant the fairest of trials because the accused faces the most serious of punishments.

With law students entering in-house prosecution clinics and prosecution externship experiences each year,[14] there are a number of questions long-overlooked concerning how law faculty teach these clinical courses and whether their students consider the special role of prosecutors. Is it necessary for clinical faculty and their students in prosecution clinics to critically examine the role of prosecutors and how prosecutors do their work? If so, what are some of the professional and ethical issues faculty should analyze with their students in prosecution clinical experiences? How can clinical faculty and students exam questions of the role of prosecutors in our society?

In this Article, I examine these and other issues concerning the professional role and ethics of prosecutors in the context of prosecution clinical courses. I start the investigation

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[13] In a national study of 5760 capital cases and 4578 capital appeals from 1973 to 1995, researchers found that prosecutorial misconduct was a major factor contributing to a 68% rate of reversible error. *See* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* i, *available at* http://ccjr.policy.net/cjedfund/preport/finrep.pdf (June 12, 2000). In an Illinois study of capital appeals, which showed a 66% reversal rate, prosecutorial misconduct accounted for 21% of all reversals. *See* Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 423 (2001).

[14] *See infra* notes 38-39 and accompanying text for a description of the prevalence of in-house and externship prosecution experiences. This Article uses the terms "prosecution clinics" or "prosecution clinical experience" to refer to in-house prosecution clinics, prosecution externship or field experiences, and hybrid prosecution clinics. "In-house" typically refers to clinics operated by law schools in which students are primarily supervised by full-time law faculty. "Hybrid" refers to clinics in which some combination of full-time faculty and lawyers from a law office not operated by the law school law supervise clinic students' legal work. For the purposes of this Article, "in-house" clinics will also include possible references to hybrid clinics. Finally, this Article uses "externship" and "field placement" interchangeably to refer to clinics where practicing lawyers who are not full-time faculty supervise law students and students work out of law offices not operated by the law school.

with a short description of the historical roots of prosecution clinics, and then discuss the duty of clinical faculty to structure prosecution clinics to reinforce ethical obligations. I proceed to analyze the role of prosecutors and highlight some issues clinical faculty should explore with their students in prosecution clinical experiences. Throughout the Article, I contend that law professors teaching students in prosecution clinics should explicitly examine the prosecutor's role in the criminal justice system both to promote the positive development of each student's professional identity and to fulfill the clinical faculty's own professional values, especially the value of striving to improve the legal profession.[15]

I. EXAMINING THE ROLE OF PROSECUTORS IN PROSECUTION CLINICS

Is it necessary for clinical faculty and students in prosecution clinics to critically examine the role of prosecutors and how prosecutors do their work? In order to answer this question, the following section examines the underlying goals of clinical legal education and how prosecution clinics fit into the clinical landscape.

A. Historical Roots of Clinical Legal Education and Prosecution Clinics

Clinical legal education has its earliest roots in providing needed legal services to the poor, and prosecution clinical experiences do not directly fit this template. The earliest legal clinics—some started as early as the 1890s—were usually called legal dispensaries or legal aid bureaus, and involved law students working with or setting up legal aid offices.[16]

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[15] *See infra* notes 47-48 and accompanying text for a discussion of professional values.

[16] *See* John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174 (1930); Quintin Johnstone, *Law School Legal Aid Clinics*, 3 J. LEGAL EDUC. 535, 541 (1951); Robert MacCrate, *Educating a Changing Profession: From Clinics to Continuum*, 64 TENN. L. REV. 1099, 1102-03 (1997); William V. Rowe, *Legal Clinics and Better Trained Lawyers – A Necessity*, 11 ILL. L. REV. 591, 591

These earliest clinics were direct client service clinics, and commentators note that the primary impetus for early clinical legal education was "the dual goals of hands-on training in lawyering skills and provision of access to justice for traditionally unrepresented clients."[17]

In order to spur the development of clinical programs, the American Bar Association (ABA) adopted a Model Student Practice Rule in 1969.[18] States that did not already have a student practice rule adopted the Model Student Practice Rule in some form to authorize law students to provide client representation under the supervision of a licensed attorney.[19] The Model Student Practice Rule states its purpose as assisting in "providing competent legal services for . . . clients unable to pay for such services and to encourage law schools to provide clinical instruction."[20] According to the ABA Section of Judicial Administration, which proposed the Model Student Practice Rule, the rule was promulgated for states to consider "in connection with the responsibility to provide legal services to all persons."[21]

The Model Student Practice Rule, however, also contains a provision authorizing students to "appear in any criminal matter on behalf of the State with the written approval of the prosecuting attorney or his authorized representative and of the supervising lawyer."[22] This provision contemplates student practice on behalf of the government, and consequently endorses prosecution clinical experiences.

Clinical legal education has developed and expanded in

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[17] Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 12 (2000).

[18] *Proposed Model Rule Relative to Legal Assistance by Law Students*, 94 A.B.A. SEC. JUD. ADMIN. REP. 290, 290 (1969) [hereinafter *Model Student Practice Rule*].

[19] *See* Joan W. Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, 68 B. EXAM'R, Aug. 1994, at 40, 40-41.

[20] *Model Student Practice Rule*, *supra* note 18, at 290.

[21] William M. McAllister, *Report*, 94 A.B.A. SEC. JUD. ADMIN. REP. 290, 290 (1969).

[22] *Model Student Practice Rule*, *supra* note 18, at 290.

the last several decades, and not every law school tailors all of its clinical courses to fit into the historical access to legal services model underpinning the clinical legal education movement and the stated rationale behind the ABA Model Student Practice Rule. There are some fee generating in-house clinical programs,[23] and there are externship programs that include placements in the private sector, such as corporation counsels' offices and private law firms.[24] In addition, there are judicial externship programs that are not focused on any client representation. Both judicial and prosecution clinics are clinical experiences that are not focused on direct services to clients otherwise unable to afford access to the courts,[25] but rather public service through working with government offices responsible for some aspect of the administration of justice.

Professor Karen Knight observes that some argue against prosecution clinics because prosecution clinics do not fulfill the "public service" of providing needed legal services to those otherwise unable to afford lawyers, and critics question whether law schools should devote resources to prosecution clinics.[26] Knight explains that some faculty members have raised this question, comparing the prosecution clinic at the University of Nebraska "to providing free legal services to

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[23] *See, e.g.*, Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 285 (1992) (arguing in favor of fee-generating clinics such as those used in Chicago-Kent's in-house clinical program); Patricia Pierce & Kathleen Ridolfi, *The Santa Clara Experiment: A New Fee-Generating Model for Clinical Legal Education*, 3 CLINICAL L. REV. 439 (1997) (describing the clinical program at Santa Clara in which fees generated by an employment law clinic help to support a criminal defense clinic).

[24] *See, e.g.*, Alexis Anderson et al., *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 476 n.8 (2004) (noting that some externships include private sector placements).

[25] There are no reliable data on how many in-house and externship clinics do not involve law students working on cases for clients otherwise unable to afford lawyers. More research in this area is needed to provide a complete understanding of the types of clinical programs currently operating.

[26] *See* Karen Knight, *To Prosecute Is Human*, 75 NEB. L. REV. 847, 865 (1996) ("Indeed, an argument can be made that it is inappropriate for a law school to contribute resources to the effort to 'imprison the poor.'").

IBM."[27] Knight argues, however, that prosecution clinics are "public service" because prosecutors further the public's interest by representing communities and the people who live in those communities.[28] Knight also maintains that prosecutors often assume the role of representing victims' interests in court, and that "[m]any victims of crime are members of traditionally underrepresented groups who are very much in need of legal assistance."[29]

Everyone may not fully embrace Knight's rationale, but faculty and students working in prosecution clinics are performing a service for the benefit of the public – the enforcement of laws.[30] What fuels some of the criticisms Knight identifies is that a prosecution clinic's public service departs from the historical pro bono legal service performed by most clinical programs that expand direct access to the courts for those otherwise unable to hire attorneys.[31] In some ways, the public service of prosecution clinics is comparable to the public service of judicial externships – in both instances students are working for the public in government positions. Additionally, prosecution clinics do provide public service more so than fee-generating in-house clinics, unless the fee structure enables clients who cannot otherwise find attorneys to have legal representation,[32] or private sector externships, unless the clinic

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 866.

[30] Professor Knight states: "Whether is it [sic] more noble to represent the individual charged with rape or to represent the state in prosecuting him is a question of personal values and philosophy. It is, at a minimum, not ignoble to seek to bring to justice people who have criminally victimized others." *Id. But cf.* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001) (questioning whether lawyers committed to social and racial justice should be prosecutors given current political and public pressures on prosecutors). It is beyond the scope of this Article to examine the competing arguments for lawyers doing either prosecution or defense work. Examining these arguments in a clinical course can be beneficial, however.

[31] Knight, *supra* note 26, at 865.

[32] A fee-generating clinic could charge below market legal fees that are more affordable than market rate lawyer fees, or charge fees on a sliding scale based on each client's income so that low-income clients are not denied services. There

students work on pro bono matters.

There is also long historical precedent for prosecution clinics, though perhaps not as long as the history of legal aid type clinics.[33] It is unclear when the first prosecution clinic was started, but one commentator's claim that perhaps the first prosecution clinical program was the Harvard Student District Attorney Project, started in 1966, is probably incorrect.[34] A 1970-71 survey conducted by the Council on Legal Education for Professional Responsibility (CLEPR) indicates that the University of Denver College of Law may have offered

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may be other types of fee arrangements that fee-generating clinics can utilize to provide legal services to clients who cannot otherwise find attorneys, such as long-term payment plans, relying on cases with fee-shifting statutes that the private bar would not take, or other similar arrangements that have the net effect of expanding legal services to clients otherwise unable to afford legal counsel.

[33] The early surveys of clinical legal education programs often asked law schools to indicate whether they had "legal aid" offices or clinics. *See, e.g.*, Quintin Johnstone, *Law School Legal Aid Clinics*, 3 J. LEGAL EDUC. 535 (1951) (reporting on a survey of "legal aid clinics"); Junius L. Allison, *A Survey on Legal Clinics*, 6 STUDENT LAW. 18 (1961) (reporting on a survey of law school "legal clinics"); Junius L. Allison, *The Legal Aid Clinic: A Research Subject*, 2 STUDENT LAW. 19 (1956) (describing survey results of schools with "legal aid clinics").

[34] Michael Ash & James A. Guest, *The Harvard Student District Attorney Project*, 13 STUDENT LAW. 4, 4 (1968). In 1965, Duke Law School offered a summer internship program with some faculty involvement, but apparently no academic credit, that involved students working with both appointed defense counsel and some prosecutors. *See* Robinson O. Everett, *The Duke Law School Legal Internship Project*, 18 J. LEGAL EDUC. 185, 189-96 (1965). Students received some pay, *id.* at 186, and it is unclear whether this summer program was considered a clinical program. For example, the Council on Legal Education for Professional Responsibility's (CLEPR's) definition of "clinical" included "the requirement that the students be supervised by the law school and receive academic credit for their clinical work." COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY OF CLINICAL AND OTHER EXTRA-CLASSROOM EXPERIENCES IN LAW SCHOOLS 1970-1971, at vi (1971) [hereinafter SURVEY OF CLINICAL EXPERIENCES]. In a CLEPR survey conducted in 1970-71, several law schools listed externship programs that included prosecution placements. *See generally id.* For example, Boston University indicated that the Student Prosecutor Program had been in existence for four years, which would make its program start date either 1966 or 1967. *Id.* at 29-30.

prosecution externship placements decades earlier,[35] and Drake Law School may have placed students with prosecutors' offices in the 1950s.[36] By the 1971-1972 academic year, CLEPR was funding ten prosecution clinical programs.[37]

Today, the Clinical Legal Educators-Interactive Directory lists nearly twenty law schools with prosecution clinics, though not all are identified as either in-house or externship clinics.[38] It is also difficult to know how many general externship clinics include some placements with prosecutors' offices, though it is likely that many more law schools than those the directory specifically lists as having prosecution

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[35] The University of Denver College of Law stated that its clinical program had been in existence since 1905, and that placements included prosecutor offices. *See* SURVEY OF CLINICAL EXPERIENCES, *supra* note 34, at 91-92. The survey form does not state the year the prosecution placements began. *See id.*

[36] In the 1970-71 survey, Drake Law School stated that some form of clinical program existed for approximately twenty years and included prosecution placements, though the start date of the prosecution placements is not stated. *See id.* at 99-100.

There may be examples of earlier prosecution clinical experiences than those listed in this Article, but there is very little literature on this topic. For readers interested in the curriculum and structure of an early prosecution externship program, there is an article describing a pilot program involving six law schools in New York placing students in district attorneys' offices in 1968. *See generally* John A. Ronayne, *A Summer Legal Intern Program for Law Students in District Attorney's [sic] Offices*, 22 J. LEGAL EDUC. 105 (1969).

[37] Robert D. Bartels, *Clinical Legal Education and the Delivery of Legal Services: The View from the Prosecutor's Office*, *in* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL LEGAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 190, 191 (1973) [hereinafter CLINICAL LEGAL EDUCATION FOR THE LAW STUDENT]. The Council on Legal Education for Professional Responsibility (CLEPR) is the final name of a Ford Foundation program that provided early funding for the development of clinical legal education programs. *See* Orison S. Marden, *CLEPR: Origins and Programs*, *in* CLINICAL LEGAL EDUCATION FOR THE LAW STUDENT, *supra* at 6-8.

[38] *See Clinical Legal Educators-Interactive Directory at* https://cgi2.www.law.umich.edu/_GCLE/index.asp (last visited Apr. 16, 2005). In addition, the directory lists other clinics with "criminal" in their titles that may include some prosecution clinics, and there is a greater number of general externship clinics listed, some of which may include students at some prosecution placements. *See id.*

clinics offer some prosecution clinical experiences.[39] Given the historical roots for and large number of prosecution clinical experiences, the question is far less whether there should be prosecution clinics, but rather how do faculty structure those clinical experiences.

B. Duty to Structure Prosecution Clinics to Reinforce Ethical Obligations

Every faculty person teaching a clinical course has the duty to structure the course to reinforce the ethical obligations of clinic students, and this duty extends equally to faculty teaching prosecution clinics, criminal defense clinics, civil clinics, and non-litigation clinics such as transactional or ADR clinics.[40] For most law students, a clinical course is one of

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[39] The Clinical Legal Educators-Interactive Directory does not include information on the different placements for general externship programs. *See id.* Anecdotal information gained through conversations with many faculty over the past twenty years indicates that a large number of law schools with general externship programs include placements for students in local, state and federal prosecutors' offices. Data also demonstrate that more than 14,000 students each year take externship courses. During the 2001-2002 academic year, 14,857 students took externship courses. E-Mail from David Rosenlieb, ABA Data Specialist, to Peter A. Joy (Dec. 19, 2003, 09:14CST) (stating that during the 2001-2002 academic year 14,857 students were in field placement courses) (on file with author). Without good data indicating how many of the more than 14,000 students in externship courses were placed in prosecutors' offices and how many students take in-house prosecution clinical courses, there is no way of knowing precisely how many students have prosecution clinical experiences each year. More research and better data collection are needed in this area. The recent efforts by Professor Hans Sinha to update data on prosecution clinical expereinces is a positive step. *See* Hans P. Sinha, *Prosecutorial Externship Programs: Past, Present and Future*, 74 MISS. L.J. 1297 (2005).

[40] I have previously argued that there are at least three important reasons for faculty to structure clinical programs to reinforce ethical obligations of clinic students:

> First, supervising clinical faculty have an ethical duty to ensure that all clinical students follow the rules of ethics. Second, holding clinic students to the same ethical standards as lawyers instills and reinforces professional values in law students. Third, clinical faculty are important role models and play an important part in teaching professional responsibility or legal ethics to clinic students.

Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S.

their first, if not their first, experience doing legal work. Thus, their first experiences are likely to be lasting ones and will shape their approach to the practice of law.[41] If the clinic students are certified under student practice rules as student-lawyers and have primary or substantial responsibility on cases,[42] they also are confronting the same pressures and ethical dilemmas they will face once they become lawyers.[43] As prosecution clinic students face the issues of defining their roles as lawyers, clinical faculty can play a critical role in the development of students' professional identities by engaging them in a process of critique, self-critique and self-reflection on their work, the work of other prosecutors working with them, and the work of defense lawyers and judges.[44]

One of the primary goals of clinical legal education is training in professional responsibility because a clinical experience provides law students with the opportunity to learn how to apply and follow the ethics rules as well as how to interact with others in their role as lawyers.[45] In developing

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TEX. L. REV. 815, 834 (2004).

[41] *See* Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35, 42-45 (2003) (explaining "[t]he law school clinic is the best place for the student to become acculturated to the ethical practice of law").

[42] Students certified under student practice rules are admitted to the limited practice of law and are able to perform all of the essential lawyering functions, usually under the supervision of law faculty or another licensed lawyer, in the jurisdictions where they practice. Therefore, student practice rules enable certified law students to be primary lawyers or "first chair" on behalf of their clients.

[43] Joy, *supra* note 40, at 836.

[44] Donald Shön explains that this process of self-critique assists students in the process of learning how to learn from their experiences, a process Shön calls reflective practice or "reflection-in-action." DONALD A. SHÖN, EDUCATING THE REFLECTIVE PRACTITIONER 31-36 (1987).

[45] The search for a better way of instilling professional responsibility in law students was one of the major premises prompting the development of clinical legal education in the 1960s. There was a shared belief that the classroom was not effective in "inculcating professional standards, whether in the field of legal ethics or in the broader aspects of professional responsibility." Howard R. Sacks, *Education for Professional Responsibility: The National Council on Legal Clinics*, 46 A.B.A. J. 1110, 1111 (1960). The National Council on Legal Clinics (NCLC) was the original Ford Foundation program to provide funding to law school clinics, and NCLC eventually became the Council on Legal Education for Professional Responsibility (CLEPR). Barry et al., *supra* note 17, at 18-19.

a sense of the lawyer's role, clinic students also are exposed first-hand to how law affects people. In discussing the value of clinical legal education, William Pincus, former President of CLEPR, remarked that many clinic students develop "sensitivity to malfunctioning and injustice in the machinery of justice and the other arrangements of society."[46] Engaging prosecution students in institutional critique of the criminal justice system provides the same opportunity to explore how the justice system and the law affect everyone in society.

The MacCrate Report identified four values for the legal profession, and three of the values are related to the development of the professional "self": striving to promote justice, fairness, and morality; striving to improve the legal profession; and professional self-development.[47] Considering these values, many clinical faculty incorporate some aspect of institutional critique as one of the goals of their clinical courses.[48]

Professor Linda Smith argues that students in prosecution externships should not only perform the work in their placements, but they should "behave as savvy participant-observers" and consider how the prosecutors in their offices define their roles and perform their work, such as exercising

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[46] Symposium, *The American Bar Association's National Conference on Professional Skills and Legal Education*, 19 N.M. L. REV. 1, 103 (1989) (remarks of William Pincus).

[47] AMERICAN BAR ASSOCIATION SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 213-21 (1992) [hereinafter MACCRATE REPORT]. This ABA report is known as the MacCrate Report in recognition of Robert MacCrate, Chair of the Task Force that produced the report. *See* Ruthann Robson, *The Zen of Grading*, 36 AKRON L. REV. 303, 321 n.87 (2003).

[48] *See, e.g.*, Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 572 (1980) (noting that clinical faculty are particularly well-situated to broaden our "understanding of the role of law and lawyer in society . . . by a sustained and rigorous analysis"); Stephen Wizner & Dennis Curtis, *"Here's What We Do": Some Notes About Clinical Legal Education*, 29 CLEV. ST. L. REV. 673, 678-79 (1980) (noting that a clinical program can be a laboratory for examining the law and legal process and should result in efforts to reform the process).

discretion.[49] In-house and hybrid prosecution clinics also should be structured to encourage clinic students to serve as "savvy participant-observers" not only about their own work, but also about the work of their supervising faculty and other prosecutors with whom they work. The students' experiences in prosecution clinics provide them with a unique vantage point to critically examine the role of prosecutors, gain awareness of how prosecutors do their work, and consider whether reforms are necessary to promote justice and improve the legal system.[50]

These guided observations by students in every type of prosecution clinic are critical to helping students understand, critique, and develop their role as prosecutors. The next section of this Article will explore the question of the prosecutor's role and highlight some issues clinical faculty teaching prosecution clinics should explore with their students.

II. UNDERSTANDING THE ROLE OF THE PROSECUTOR

Is the role of the prosecutor in our legal system special or different from other lawyers? The common understanding is that the prosecutor's role is unique – much different from the role of a criminal defense lawyer or a civil lawyer. This understanding is expressed in ethical rules and court decisions that refer to the "special responsibilities" and "extraordinary duties" of prosecutors, and admonishments that a prosecutor is a "minister of justice" and has a duty to "seek justice."[51] But, do prosecutors perform their work differently than other lawyers? And, are prosecutors insulated from the same types of

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[49] Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 550 (1999).

[50] Professor Knight states that in her prosecution clinic students "are encouraged to reflect about and critique existing rules, procedures, and institutions." Knight, *supra* note 26, at 863. She also notes: "Participation in the system gives the student a unique understanding of the obstacles to systemic reform as well as the perils of complacency." *Id.* at 863-64.

[51] *See supra* note 8 and accompanying text. *See also* Peter A. Joy & Kevin C. McMunigal, *Are a Prosecutor's Responsibilities "Special"?*, 20 CRIM. JUST. 58 (2005).

criticisms levied against other lawyers? The answers to these questions are central to understanding the role of the prosecutor, and clinical faculty and students are particularly well situated to explore these and other questions about the work prosecutors perform.

A. Prosecutors as Zealous Advocates?

The ethics rules for prosecutors treat the prosecutor as both an advocate and as a "minister of justice."[52] The problem, though, is that the ethics rules do very little to describe the role of "minister of justice," while every lawyer has an understanding of what it means to be a "zealous advocate" in our adversary system of justice.[53]

Perhaps the most famous example of what it means to be a zealous advocate is traced to Henry Brougham's defense of

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[52] MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[53] The first set of ethics rules adopted by the ABA was the 1908 Canons of Ethics, and the concept of zeal appears as Canon 15, which states:

> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.

CANONS OF PROFESSIONAL ETHICS (1908).

The term "zealous advocate" is derived from Canon 7 of ABA's Model Code of Professional Responsibility, adopted in 1969 to replace the 1908 Canons of Professional Ethics, which states, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." MODEL CODE, *supra* note 7, at Canon 7. The concepts of zeal and zealous representation also appear in the current Model Rules. The Preamble to the Model Rules states: "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." MODEL RULES, *supra* note 7, at pmbl. A comment to the rule discussing the lawyer's obligation to act with diligence provides: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* R. 1.3 cmt. 1.

Queen Caroline before England's House of Lords in 1820.[54] In mounting a defense for Queen Caroline, Brougham suggested that he would take every step necessary to advance his client's interests even at the expense of possible damage to King George IV.[55] He stated words that appear today in most U.S. legal ethics textbooks:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[56]

The concept that a lawyer must place the interests of the client above all other interests pervades the justice system. Lawyers view themselves as zealous advocates advancing their clients' goals by any means necessary, as long as those means are legal. This norm of the legal profession involves a degree of indifference to the interests of the opposing parties and witnesses. Indifference to others, in turn, fosters a view of moral neutrality or moral non-accountability, which maintains that a lawyer acting in the role as a zealous advocate in an adversary system is just doing his or her job without regard of the interests of others. Thus, a lawyer acting on behalf of a client expects to be judged only by whether the lawyer follows the law and the rules of ethics for lawyers.[57]

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[54] ROBERT STEWART, HENRY BROUGHAM 152 (1985).

[55] *Id.* at 154.

[56] 2 TRIAL OF QUEEN CAROLINE 3 (New York, J. Cockroft 1879).

[57] *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1, 3-7 (1975). Professor Richard Wasserstrom describes this as role-differentiated behavior, whereby the special relationship between clients and lawyers leads lawyers to set aside various considerations, particularly moral considerations, and attempt to achieve the client's end by any means that are legal. *Id.* at 5-6.

This zealous partisanship in the adversary system gives rise to a chief criticism about lawyers being amoral if not immoral in dealings with the rest of the world.[58] One area worthy of exploration with clinical students in a prosecution clinic is the consideration of the zealous advocacy criticism in view of the students' own approaches to prosecution as well as the approaches of the prosecutors with whom the students work. Are they partisan advocates indifferent to the interests of others – particularly the interests of the accused?

Without probing how prosecutors actually perform their work, one may think that the zealous advocacy criticism, and resulting amorality or immorality, is inapplicable to the role of a prosecutor because the prosecutor does not represent a single client but rather represents the citizenry on a local, state, or federal level. In representing the interests of everyone in the community, law students are taught that a prosecutor should be concerned with the community's interest, which the ethics rules assume is procedural justice.[59] But, how does a prosecutor balance the ill-defined role of minister of justice with what the prosecutor understands to be the role of zealous advocate? Do students in prosecution clinics see this issue? And, do students in a prosecution clinic see prosecutors with whom they work act differently than other lawyers by curbing their zealous advocacy to emphasize procedural justice?

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[58] Professor David Luban has argued:

> The adversary system excuse carries as a corollary the standard conception of the lawyer's role, consisting of (1) a role obligation (the "principle of partisanship") that identifies professionalism with extreme partisan zeal on behalf of the client and (2) the "principle of nonaccountability," which insists that the lawyer bears no moral responsibility for the client's goals or the means used to attain them.

DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY xx (1988).

[59] The ethics rules assume that procedural justice is a societal goal and state that a prosecutor's responsibility as a minister of justice "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

B. Prosecutors as Ministers of Justice?

The ethics rules do not define what it means to be a "minister of justice" beyond stating that a prosecutor has an ethical obligation "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[60] Instead, the rules define six obligations for a prosecutor: requiring probable cause before bringing charges;[61] making reasonable efforts to ensure that the accused has been advised of and has the right to counsel;[62] refraining from seeking a waiver of important pretrial rights from unrepresented defendants;[63] making timely disclosure of all evidence or information that tends to negate guilt or mitigate sentence;[64] refraining from subpoenaing a lawyer to give evidence about a past or present client except under limited circumstances;[65] and limiting "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[66] Thus, a prosecutor may conclude that compliance with these ethical requirements fulfills the special obligations

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[60] *Id.*

[61] A prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." *Id.* R. 3.8(a).

[62] A prosecutor shall "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." *Id.* R. 3.8(b).

[63] A prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." *Id.* R. 3.8(c).

[64] A prosecutor shall:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Id. R. 3.8(d).

[65] A prosecutor shall "not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes" the information is not protected by privilege, is essential, and "there is not other feasible alternative to obtain the information." *Id.* R. 3.8(e).

[66] *Id.* R. 3.8(f).

of being a prosecutor. But, are these ethical obligations for prosecutors really special?

Clinical faculty can explore with their students in a prosecution clinic whether these ethical obligations for prosecutors are "special" in light of ethics obligations applicable to other lawyers. For example, the requirement of probable cause for a prosecutor to file charges is not so different from the requirement that all lawyers "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[67] The only exception to the requirement that a lawyer shall not controvert an issue without a basis in law and fact is that a defense lawyer may "defend the proceeding as to require that every element of the case be established."[68] This exception advances the constitutional principles that the state must prove every element of a charged offense, the presumption of innocence, and the right against self-incrimination.[69] The probable cause standard also may be compared to the Civil Rule 11 standard that a lawyer must not bring a claim or defense unless it is well grounded in fact and "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law."[70]

The restriction on extrajudicial comments is another duty that is not unique to prosecutors, because another ethics rule prohibits all lawyers from making "an extrajudicial statement that the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[71] Prosecutors also have the explicit duty to control statements by law enforcement personnel and employ-

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[67] *Id.* R. 3.1.

[68] *Id.* This exception also applies to civil proceedings that may result in incarceration. *Id.*

[69] U.S. Const. amend. V (stating that "no person . . . shall be compelled in any criminal case to be a witness against himself").

[70] FED. R. CIV. P. 11.

[71] MODEL RULES, *supra* note 7, at R. 3.6(a).

ees,[72] but this restriction is similar to ethical requirements that lawyers must ensure that employees and others "retained by or associated with a lawyer" comply with the professional obligations the lawyer has.[73] Another ethics rule, applicable to all lawyers, states that it is professional misconduct for a lawyer to violate the ethics rules "through the acts of another."[74] Thus, the obligation of a prosecutor with regard to public statements is very similar to the duty of criminal defense and civil lawyers.

One rule that is different for a prosecutor and a defense lawyer is the prosecution's duty to turn over exculpatory evidence to the defense.[75] This requirement, however, is less demanding than requirements for civil lawyers under modern discovery rules. In a civil matter, a party must, even without a discovery request, turn over all information and the identity of all witnesses that support any of a party's claims or defenses.[76] The civil discovery rule also permits a party to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" even if the information is not admissible at trial "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[77] Thus, the only lawyers without affirmative discovery obligations to reveal some information that may be harmful to a client's case are defense lawyers, where a client's constitutional right against self-incrimination is implicated.[78]

These examples illustrate that some of the stated ethical obligations for a prosecutor do not differ greatly than those for other lawyers, except in limited situations where the constitu-

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[72] *Id.* R. 3.8(f) (stating that a prosecutor must "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor" from making prohibited extrajudicial statements).

[73] *Id.* R. 5.3 (describing the lawyer's responsibilities to ensure that nonlawyer assistants comply with the ethics rules).

[74] *Id.* R. 8.4(a).

[75] *Id.* R. 3.8(d).

[76] *See* FED. R. CIV. P. 26.

[77] FED. R. CIV. P. 26(b)(1).

[78] *See* U.S. CONST. amend. V.

tional rights of the accused permit a defense lawyer to require the state to prove its case beyond a reasonable doubt and excuse the defense lawyer from turning over discovery material protected by the accused's right against self-incrimination.

The areas where the ethical obligations are truly unique usually have to do with powers unique to prosecutors. For example, prosecutors are restricted from using a grand jury subpoena to compel a lawyer "to present evidence about a past or present client" unless certain conditions are fulfilled.[79] Only prosecutors have the power to subpoena testimony before a grand jury, so the uniqueness of this ethics rule is due to the unique authority of the prosecutor. Similarly, the ethics rule states that a prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing."[80] Again, this restriction is unique to prosecutors because the prosecutor is the only lawyer who is in a position to obtain such a waiver.

Evaluating the ethical obligations of prosecutors with students in a prosecution clinic will highlight for them that a prosecutor's obligations are similar to those of other lawyers, or usually differ in areas where only prosecutors wield authority. Exposing these aspects of a prosecutor's ethical obligations, in the context of the overarching duty to seek justice, will help to illustrate that a prosecutor's truly unique or special ethical obligations are in areas where prosecutors exercise discretion. In discussing the exercise of discretion, law students in a prosecution clinic will see that their conduct normally will not be covered either by general ethics rules or the special ethics rules for prosecutors. In these instances, the role of being a minister of justice requires a prosecutor to act as a monitor both of substantive and procedural justice in ways not expected of criminal defense lawyers or civil advocates. By asking students to consider their work and decisions, and the work and decisions of the prosecutors with whom they work, in this light, should

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[79] MODEL RULES, *supra* note 7, at R. 3.8(e). See *supra* note 65 describing the limits on grand jury subpoenas for lawyers.

[80] *Id.* R. 3.8(c).

generate critical thinking about the differences and similarities between prosecutors and other lawyers – particularly defense counsel. The next section considers the differences between prosecutors and defense counsel.

C. Comparing Prosecutors to Defense Counsel

The adversary system is, by its nature, based on a competitive rather than cooperative model. The adversary system assumes that partisan advocates will represent each side to a dispute and that the process will most often result in the best resolution of each dispute. Students entering a prosecution clinic, like lawyers becoming prosecutors, approach their work with this idea of partisanship firmly entrenched. As the foregoing discussion comparing and contrasting a prosecutor's ethical obligations with those of defense lawyers and civil lawyers reveals, the ethical standards for prosecutors are more similar than different from those applicable to other lawyers. Where the standards do differ, they differ most when we compare prosecutors to defense counsel. In addition to some of the constitutional reasons for differences between prosecutors and defense counsel, are there policy reasons to treat defense counsel differently than prosecutors?

Commentators usually agree that a person charged with a crime is at a distinct disadvantage when the resources of the state are brought to bear, and that a zealous advocate in the form of a defense lawyer is necessary to try to offset this resource imbalance.[81] The logical inference derived from this justification of zealous advocacy by defense counsel is that a prosecutor, who usually has the resource advantage, should not be as partisan as defense counsel in some instances. Consider the following examples.

In civil litigation, one side may have superior resources

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[81] *See, e.g.*, Luban, *supra* note 58, at 58 (endorsing the argument that "zealous adversary advocacy of those accused of crimes is the greatest safeguard of individual liberty against the encroachments of the state"); Wasserstrom, *supra* note 57, at 12 (arguing that the special needs of the accused justify the aggressive, and at times amoral, approach of criminal defense lawyers).

than the other side, but liberal rules of discovery can overcome some of this imbalance by insuring both sides access to all of the facts and even inadmissible information that "appears reasonably calculated to lead to the discovery of admissible evidence."[82] In contrast, the prosecutor has access to all of the information compiled by the police and others through their investigation, as well as access to law enforcement databases closed to all others. In most criminal cases, the wealth of information available to the prosecutor leaves the prosecutor with most of the cards. Does the prosecutor share this information with defense counsel, effectively instituting an open file discovery policy, or does the prosecutor give defense counsel the bare minimum required by discovery rules and legal standards? Also, does the prosecutor withhold some exculpatory evidence until shortly before trial in order to gain a tactical advantage over defense counsel? These types of questions, implicating the exercise of discretion, help to engage clinical students in their examination of the role of a prosecutor.

A defense lawyer, even when representing an accused who may be factually guilty, has an ethical obligation to represent the client and seek an acquittal if the government's evidence is not sufficient. In contrast, a prosecutor has the unique obligation to guarantee that a defendant is only convicted upon sufficient evidence, and is also responsible to see that the accused "is accorded procedural justice."[83] Because of this responsibility, the prosecutor should take special care in assembling evidence. For example, a prosecutor should be careful whenever using inducements, such as reduced charges or immunity, to gain testimony against the accused.[84] Again, the role of a prosecutor is unique in this regard because a prosecutor may offer inducements to witnesses for their testimony and defense law-

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[82] FED. R. CIV. P. 26(b)(1).

[83] MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

[84] *See generally* Joel Cohen, *When Prosecutors Prepare Cooperators*, 23 CARDOZO L. REV. 865 (2002); Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases*, 23 CARDOZO L. REV. 771 (2002).

yers may not.[85]

Another area where a prosecutor's obligations differ from those of defense counsel is in advocacy before a fact finder, whether the judge or a jury. A defense lawyer may vigorously cross-examine a witness the defense lawyer knows to be truthful,[86] but a prosecutor may not mislead the fact finder by undermining the credibility of a truthful witness.[87] This restriction is meant to curb zealous advocacy where it may erode procedural justice for the accused. Similarly, a prosecutor may not urge the fact finder to draw an inference from the evidence the prosecutor knows to be contrary to underlying facts.[88]

In many ways, these differences between prosecutors and defense counsel emphasize the prosecutor's obligation not to seek convictions at all costs – not to seek simply to win. When winning becomes the primary goal, investigations demonstrate that prosecutors sometimes sacrifice justice to win.[89] It can lead to overtly unethical practices, such as hiding evidence, overreaching in arguments by vouching for witnesses' testimony or sitting silent while witnesses "shave" the truth.[90] A fo-

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[85] Uviller, *supra* note 84, at 774-75.

[86] Cross-examination to discredit the truthful witness is a subject many commentators have addressed, and most have agreed that it is a proper tactic for defense counsel. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER ETHICS 213 (2d ed. 2002).

[87] ABA standards for prosecutors state that a prosecutor's belief that the witness is telling the truth "may affect the method and scope of cross-examination" and a "prosecutor should not use the power of cross-examination to discreit or undermine a witness if the prosecutor knows the witness is testifying truthfully." ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Stand. 3-5.7(b) (3d ed. 1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE]; *see also* Green, *supra* note 11, at 1596.

[88] "In closing argument to the jury, the prosecutor may argue all reasonable inferences from the evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury from the inferences it may draw." ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 87, Stand. 3-5.8(a); Green, *supra* note 11, at 1596.

[89] *See generally* Maurice Possley & Ken Armstrong, *Trial and Error: The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at N1 (reporting on the over-emphasis on winning at some prosecutors' offices leading to unethical conduct).

[90] *See id.* (giving examples of unethical conduct resulting from a scorekeeping mentality by prosecutors).

cus on winning can also lead to what one former prosecutor calls the "dark secret" of prosecutorial conduct – unethical coaching of witnesses.[91]

By comparing the role of a prosecutor with that of a defense lawyer, faculty and prosecution clinic students can identify the underlying obligations of a prosecutor that militate in favor of restraint in some instances in order to do justice even while seeking to convict a defendant the prosecutor believes to be guilty. Such an exploration with clinical students will help them understand the competing values in the criminal justice system, and how the exercise of prosecutorial discretion is key to the proper functioning of the justice system.

CONCLUSION

The plain text of the ethics rules provides little guidance to prosecutors, and consequently little guidance to law students in

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[91] Professor Bennett Gershman maintains:

> [I]t is indisputable that some prosecutors coach witnesses with the deliberate objective of promoting false or misleading testimony. Prosecutors do this primarily to (1) eliminate inconsistencies between a witness's earlier statements and her present testimony, (2) avoid details that might embarrass the witness and weaken her testimony, and (3) conceal information that might reveal that the prosecutor has suppressed evidence.

Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 833-34 (2002). Prior to becoming a law professor, Professor Bennett Gershman was an Assistant District Attorney in New York City for five years and a Special Assistant Attorney General for New York State for four years. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS, 2003-2004, at 549 (2003).

To support his contention, Gershman cites to several examples of each type of impermissible coaching from a number of cases, some of them capital cases, in which the resulting convictions were reversed. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 443 n.14 (1995) ("The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury."); Alcorta v. Texas, 355 U.S. 28, 30-31 (1957) (coaching witness to give literally truthful answers that avoided the subject of the witness's sexual conduct with the victim that would be embarrassing or harmful); Walker v. City of New York, 974 F.2d 293, 300 (2d Cir. 1992) (condemning a prosecutor's failure to disclose that a witness's testimony was inconsistent with the witness's original statement that there were two perpetrators).

prosecution clinics. The ethics rules assume that there is something special about a prosecutor's ethical obligations, but the rules fail to address how a prosecutor should act or exercise discretion in many situations a student in a prosecution clinic may encounter. This is particularly problematic because prosecutors have extensive power and discretion. Exploring these issues with prosecution clinic students will not only help law students shape their own professional identities as prosecutors, but also engage them in a critical exploration of the professional values of striving to promote justice, fairness, and morality, as well as striving to improve the legal profession.[92] These issues of the prosecutor's role and professional values are exactly the types of issues that clinical faculty are well-situated to explore with their students.

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[92] *See supra* note 47 and accompanying text.

THE USE OF "BOOT CAMPS" AND ORIENTATION PERIODS IN EXTERNSHIPS AND CLINICS: LESSONS LEARNED FROM A CRIMINAL PROSECUTION CLINIC

Larry Cunningham[*]

INTRODUCTION

Clinical faculty and externship supervisors often desire for students to "hit the ground running" in their field placement experiences in order to make maximum use of the limited time available for learning. This article proposes a solution to a chronic dilemma in clinical legal education: how to use a classroom component to prepare students effectively for concurrent work in an externship or clinic.

Pre-semester orientation periods—or what I term "boot camps"—can infuse skills and knowledge into students to enable them to start their externship or clinic experience with

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immediate, practical skills and knowledge. This empowers them to make effective use of their first few weeks in the course. A boot camp can be as simple as a one- or two-hour orientation to the clinic office. It could also be a week-long seminar on skills development and substantive law. Boot camps are, in effect, a way of front-loading instruction in a course. This provides a number of benefits to students and instructors alike. There are, however, costs associated with front-loading portions of a course. On balance, I believe the benefits far exceed the costs in most situations.

In Part I of this article, I discuss my own boot camp experiences, both as a law student and later as a law professor. In Part II, I layout the challenges as I see them in structuring a classroom component for a clinical or externship course. In Part III, I turn to the specifics of front-loaded instruction, discussing different types of boot camps and the advantages and disadvantages of each model. In Part IV, I discuss two areas of possible, future direction for boot camps.

I. My Boot Camp Experiences

When I took over as director of Texas Tech's Criminal Prosecution Clinic in the Summer of 2003, I decided to implement a boot camp to better prepare my students for their work in our local district attorney's office.[1] My use of a boot

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[1] The Criminal Prosecution Clinic was a one-semester, four-credit elective that was offered to eight students per semester. Students worked as externs at the Lubbock Criminal District Attorney's Office, the Hockley County District Attorney's Office and the Garza County District Attorney's Office. They were required to perform 220 hours of service in their assigned prosecutor's offices, performing a range of functions including making charging decisions at intake, extending plea offers to defense attorneys, litigating motions and trials and assisting prosecutors with legal research. Students were supervised on a day-to-day basis by assistant district attorneys. I taught the classroom component of the course, observed students in court and worked with the prosecutors to ensure that students were receiving appropriate work.

Ultimately, the faculty of Texas Tech Law School—on my recommendation—discontinued the Criminal Prosecution Clinic after the spring semester of 2004. Our rationale was three-fold: (1) although students were getting a good experience in the Criminal Prosecution Clinic, we felt that an in-house clinic would provide students with a much better and more controlled learning experi-

camp was born out of: (1) my own experience as a law student at Georgetown; and (2) educational purpose. Indeed, my use of a boot camp in my clinical teaching has evolved even in the past year and will no doubt continue to evolve as I adapt what I have developed to meet new and changing needs.

A. As a Student

One of the reasons I chose to attend Georgetown University Law Center was its clinical programs. In the Spring of 1999, I applied for, and was accepted into, the Georgetown Juvenile Justice Clinic, taught by Associate Dean Wallace Mlyniec, Professor Barbara Butterworth and Prettyman Fellow Alison Flaum. The Juvenile Justice Clinic represents alleged juvenile delinquents in Washington, D.C.[2] One of the requirements of the clinic was that we report to "Boot Camp" five days before classes began.

Boot Camp began modestly, with bagels, coffee and brief introductions from "Wally," "Barb," and "Ali," as we were instructed to call them.[3] Within fifteen minutes, however, we had delved into the intricacies of the District of Columbia Family Code. The morning of our first day involved reviewing and synthesizing the hundreds of pages of case law that we had to read during the summer. By the end of the morning, we had a rough idea of how the juvenile justice process worked and what our role was in that system. In the afternoon, we rolled up our sleeves and began our first "forensic exercise": arguing a hypothetical bond motion. I stood up to

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ence; (2) we felt that the Law School owed an obligation to the people of West Texas to produce a cohort of graduates each year who were capable of providing direct representation in criminal cases; and (3) students who were interested in working for prosecutors could still work for the District Attorney's Office through our externship class. Beginning in the fall of 2004, we began the Texas Tech Criminal Justice Clinic under my supervision. The clinic is a year-long, eight-credit course. It, too, has a boot camp.

[2] *Georgetown Law—Juvenile Justice Clinic*, *at* http://www.law.georgetown.edu/clinics/jjc/index.html (revised Oct. 1, 2004).

[3] For an interesting discussion of the use of first names in clinical instruction, see Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 200 (1995).

begin what I had thought was going to be an articulate, persuasive and—dare I say—brilliant argument on behalf of my hypothetical client. Before I could open my mouth, the "judge," played by Professor Butterworth, said, "Thank you, counselor, I don't need to hear from you. I have already made up my mind." I sheepishly sat down, befuddled. What kind of a judge would make up his or her mind after hearing from only one side? "What did he do wrong?" she asked the rest of the class. "He gave up," she said to the silent mass of sixteen students. "Sometimes you have to elbow your way in and make the judge hear you." Professor Butterworth taught me two valuable lessons that day: (1) zealous advocates are not always polite; and (2) I had much to learn in clinic about being an effective lawyer and advocate.

The next five days included lectures on juvenile law and procedure, demonstrations, information on fact investigations and more forensic exercises. By the end of that week, we had learned the basic skills we would need to get through the first few weeks in representing our clients. The rest, we were told, would come later in the semester. And it did. We went on to learn how to litigate every aspect of a jury trial as well as how to represent our clients in the important phase of disposition. We contemplated the social causes of crime and confronted our own biases and prejudices in dealing with our largely poor, underprivileged and minority clients.

Make no mistake about it: boot camp was tough. We began everyday at 9 a.m. and ended around 4 or 5 p.m.—a very long day for sixteen third-year law students, most of whom had just completed a prestigious (but not too taxing) summer as "summer associates" in many of the big Washington, D.C., law firms. Every moment of each day in boot camp was planned-for. Lectures were mixed in with forensic exercises in order to keep us interested and alert.

B. As a Professor

Fast-forward four years. Having completed a federal district court clerkship and served two years as a juvenile delinquency prosecutor in Virginia, I had been hired as the new

director of the Criminal Prosecution Clinic at Texas Tech University School of Law in Lubbock, Texas. The Criminal Prosecution Clinic was a four-credit externship/clinic hybrid for eight students.[4] The clinic ran in the fall and spring, with a new group of students each semester. Students were placed with area prosecutors' offices where they worked on cases under the authority of Texas' student practice rule.[5] Prosecutors served as the primary, day-to-day supervisors in the respective placements. The faculty director taught the classroom component of the clinic, a two-hour weekly seminar, and oversaw the students' learning experiences in the field. In the previous two years, there had been three separate directors of the clinic. Students and faculty had expressed concern about the rigor of the classroom component of the clinic and the quality of experience students were getting in the field.

In assessing the operation of the clinic at the time, I quickly gathered that part of the difficulty in getting students good experiences in the clinic was the limited time the prosecutors had to work with them. Fourteen weeks is not a lot of time to get students "up to speed" and actually learning about the role of the prosecutor. Further, Texas criminal procedure is complicated and cumbersome. It was too much to ask field supervisors to teach students the intricacies of Texas criminal practice in fourteen weeks. Students needed the ability to "hit the ground running" so they could be immediately put to work in their site placement.

I decided to implement a "boot camp," modeled after my experience at Georgetown. During pre-registration, I told students that they would have to come back to campus three days early for clinic orientation. I assigned a lengthy summer reading list which included materials on Texas criminal procedure and advocacy techniques. To balance for the extra time they were spending in boot camp, I met with them in our

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[4] *See supra* note 2.

[5] *See* TEXAS RULES AND REGULATIONS GOVERNING THE PARTICIPATION OF QUALIFIED LAW STUDENTS AND QUALIFIED UNLICENSED LAW SCHOOL GRADUATES IN THE TRIAL OF CASES (2003).

seminar component once a week for the first half of the semester and once every two weeks during the second half. This ensured that, in fact, boot camp represented a "front-loading" of the course, instead of an "overloading."

I began boot camp with an exercise on charging decisions. I gave the students a hypothetical case, complete with real police reports and a criminal history printout. Students had to read over the packet and decide which charges, if any, should be filed. I used the same hypothetical case (a domestic violence report) throughout boot camp; this taught students how the decisions in the charging and investigative stages of a prosecution can impact the later stages of the case. It also forced them to think carefully about the decisions they made at each stage of the case.

I identified as an educational goal giving students enough information so they could start their placements with the ability to accomplish the tasks that they would likely be assigned in their first few weeks. Out of this goal flowed two specific skills that I wanted to teach: witness interviewing and examination, and basic criminal procedure in misdemeanor cases. My goal was not to teach them every aspect of trial advocacy or Texas criminal procedure—there would be plenty of time for that during the fourteen-week semester ahead of us.

II. CHALLENGES IN STRUCTURING A CLASSROOM COMPONENT

Before addressing the question of how a boot camp can be effectively used in a clinic or externship program, the desirability of a seminar component should be addressed. Whether a clinic should have a classroom component is a separate question from how one should be designed. The answer to both questions, however, is the same: It depends. I will start with the assumption that nothing in a law school course should occur "just because." Rather, every component of a course, from the teaching style to the assessment format, should be born out of educational purpose,[6] the result of a reasoned

[6] *See* GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 140-44

thought process and with the purpose of achieving a certain educational outcome. Each component should further one of the educational goals of the course. In this case, whether a clinic should have a contemporaneous seminar and, if so, how it should be structured, are questions that should be answered by asking the question, "What purpose would such a component serve?"[7] In this section, I will address the challenges and problems associated with creating and structuring a classroom component for a clinic or externship class, paying particular attention to prosecution externships and clinics.

A. The Desirability of Classroom Components

Classroom components have been a subject of debate and discussion in the scholarship on clinics and externships.[8] The majority of clinics and externships include some form of classroom instruction in addition to field experience.[9]

(2000). Munro argues that the design of a law school course should flow logically from a law school's mission statement which, in turn, establishes the educational goals of the course. *Id.* at 139-40. The educational goals of a course then help to determine the way in the which the course is taught and how students are assessed. *Id.* at 140.

[7] In other words, a professor should not start with the assumption that there must be a classroom component and that it must be taught in a certain fashion. Instead, components of a course should be structured around the course's educational goals. Educational tools which do not further the educational mission of a course should be abandoned.

[8] *Compare* Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 CLINICAL L. REV. 659 (2004) (arguing against externship class requirement in all cases), *with* Stacy Caplow, *From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic*, 75 NEB. L. REV. 872, 886-908 (1996) (discussing academic benefits with a classroom component and possible uses of such class time).

[9] Professors Seibel and Morton conducted a survey in the early 1990s which found that during the 1992-1993 academic year, 69% of externship programs reported having some classroom component. Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 429 (1996). Most programs met for at least one hour a week during the semester. *Id.* at 431. While arguing that they had "no doubt that classroom components can enhance students' experience in externships," Seibel and Morton cautioned that this conclusion should not be interpreted as a signal that programs without a classroom component were defective in their design. *Id.* at 429.

Classroom components in externship courses exist, in part, because of American Bar Association standards.[10] The American Bar Association previously "preferred" that externships had a "contemporaneous or tutorial component taught by a faculty member,"[11] but did not require such a component unless the externship was offered for six or more academic credits.[12] The rule was amended and currently provides that an externship course shall include the following:

> opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn more than six academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.[13]

In contrast, 89% of clinics in a 1992 study reported that they had a classroom component of some kind. *Report of the Committee on the Future of the In-House Legal Clinic*, 42 J. LEGAL EDUC. 508, 555 (1992). Like Seibel and Morton, the 1992 *Report of the Committee on the Future of the In-House Legal Clinic*, which reported the results of the survey, cautioned against the adoption of any one model for live-client clinics. *Id.* at 561. Instead, the Committee set forth "minimum common denominators of effective live-client" clinics. *Id.*

[10] The ABA has not treated clinics and externships equally with respect to classroom components. Professor Joy has noted that externship programs are more closely regulated by the ABA than any other program of legal instruction. Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?*, 10 CLINICAL L. REV. 681, 697 (2004).

The ABA's stricter regulation of externships reflects a historic tendency by faculty and students alike to view classroom components of externships with skepticism. Caplow, *supra* note 8, at 886. Professor Caplow explains this tendency as a natural outgrowth of the number and variety of placements in most programs, the use of administrators and adjuncts to supervise externships, the general preference for in-house clinics and the perception that externships have few personal or professional rewards. *Id.* at 886. In-house clinics continue to be viewed as the "gold standard" and anything short of that standard (i.e., externships) is viewed as second-best. Eisinger, *supra* note 8, at 663 ("Clinical faculty, including externship teachers, have largely viewed the in-house, live-client clinic as the gold standard for clinical education and continue to see externships as a distant and poor substitute, defensible only when a school cannot afford better.").

[11] A.B.A., SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Std. 305(f)(4) (2003) [hereinafter ABA STANDARDS].

[12] *Id.*

[13] *Id.* Std. 305(e)(7) (2003).

However, the ABA standard does not state what should be taught in a classroom component or tutorial, other than to require "student reflection."[14] It is important to note that the ABA's requirement is not premised on students being fully prepared to act in their placements. Instead, the requirement concerns providing students with opportunities for reflection.[15]

On the other hand, there is no comparable ABA standard requiring or even preferring a classroom component for in-house clinics. The AALS-ABA voluntary *Guidelines for Clinical Legal Education*, published in 1980, merely requires faculty to ensure that clinic students are prepared before they act.[16] Such preparation can take the form of course prerequisites, simulations or case-by-case planning and assessment.[17] Nevertheless, classroom components are one of the accepted best

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[14] The interpretations following Standard 305 likewise do not provide guidance in this area. *Id.*

Changes have recently been made to Standard 305. The new standard 305 requires periodic on-site visits (as opposed to every term) and only if the externship awarded four or more credits (down from the present requirement of six). Likewise, the requirement for a *contemporaneous* student reflection component is now imposed on externships that award four or more credits. *Memorandum from John A. Sebert, Consultant on Legal Education, to Deans of ABA-Approved Law Schools, University Presidents, Chief Justices of State Supreme Courts, Bar Admission Authorities, Leaders of Organizations Interested in ABA Standards, and Deans of Unapproved Law Schools, available at* http://www.abanet.org/legaled/standards/memor302and305standards.pdf (Aug. 23, 2004) [hereinafter *Sebert Memorandum*].

[15] Arguably, reflection requires something worth reflecting about. *See* Linda F. Smith, *Designing an External Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 542-44 (1999) (stating that when designing an externship, quality control measures should be implemented to ensure that students are doing agreed-upon work at the field placement). One reason why students may not be getting worthwhile experiences in an agency is because they are going to that agency with insufficient skills and knowledge. For this reason, I argue *infra* in Part II.E. that the ABA standard should be expanded to include a duty of law schools to send externs to agencies with minimal skills.

[16] ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, GUIDELINES FOR CLINICAL LEGAL EDUCATION 26 (1980) (Guideline VIII states: "It is the responsibility of the faculty and professional staff to ensure that each law student is prepared before the student acts.").

[17] *Id.* at 27.

practices of clinical legal education.[18]

Professor Eisinger has argued that a classroom component should be taught only if it will add to the students' experiences in their placements.[19] Unnecessary classroom components can have a backfire effect. They can send a message to students and practitioners that the learning in the field is somehow not good enough.[20] Eisinger also notes various practical difficulties that can limit the types of subjects which can be effectively taught in an externship class.[21]

Classroom components fit easier into the educational goals of a clinic or externship program where the course is homogenous in nature. Consider, first, a general, all-purpose externship class where students intern at diverse placements such as the U.S. Attorney's Office, a legal aid office, a trial judge's chambers, an appellate judge's chambers, the university's general counsel's office, a poverty law center, a solo practitioner's office and a large firm. It would be difficult to define specific goals for all of the students in such a course because their placements have little in common.[22] A class designed with such a diversity of placements would perhaps func-

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[18] *Id.* at 20.

[19] Eisinger, *supra* note 8, at 660 ("If the generic externship class can be taught, it should be taught voluntarily, for sound pedagogic reasons, because it genuinely adds value to students' experience in the field.") (internal footnotes omitted).

On balance, I agree with most of Eisinger's argument. A classroom component which exists "just because" does not, by definition, serve an educational purpose. On the other hand, a classroom component which is thoughtfully structured around the educational goals and objectives of a clinic can be valuable to both the students and professor alike. I do not read Professor Eisinger or anyone else as saying that classroom components are *never* a good idea. Instead, the argument is that a classroom component should exist only if it will serve a useful educational purpose for the course.

[20] *Id.* at 661.

[21] *Id.* at 664-65.

[22] For example, some of the students may not be doing a great deal of legal research. A trial court placement may involve primarily docket management and court observation, for example. Some students are working for the government (some state, some federal); some are working for public interest organizations (such as the legal aid office and poverty law center); and some are working for institutions (such as the university's general counsel).

tion best using small group or individual student-faculty meetings. It would be difficult to teach skills because each of the placements require significantly different skill sets. Confidentiality prevents in-depth reflection and debriefing, as would be possible in an in-house clinic.[23]

If the mission of the course is redefined in a broad fashion, however, a classroom component could become a more viable tool to help the professor achieve the goals of the course. If the purpose of a large externship class is defined as "to instill professionalism," it would be easier to create a classroom component that is meaningful to all students.[24] Topics of classroom discussion could include confidentiality, career choices, dealing with difficult supervisors and lawyer discipline.

As the goals and focus of a clinic or externship course become more narrow, the possibilities for classroom instruction increase.[25] A program where students work as prosecutors, either in-house or as externs in a district attorney's office, is ideal for some form of a classroom component. The goals for such a program could be defined narrowly: to impart skills in criminal prosecution, to have students gain an appreciation for prosecutorial discretion, and to practice skills in courtroom advocacy. A classroom component flows naturally from one or more of these goals. In other words, a contemporaneous sem-

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[23] "Case rounds" are difficult to do in an externship setting because students may owe a duty of confidentiality to their site placements. Eisinger, *supra* note 8, at 665. The new version of ABA Standard 305, which requires an opportunity for "student reflection," may prove difficult to implement for this reason. ABA STANDARDS Std. 305(e)(7).

[24] Discussion and study of professional responsibility would probably fulfill the ABA requirement of "student reflection on their field placement experience." *See id.*

[25] The traditional in-house clinic is particularly suited for a classroom component because, typically, it has a narrow substantive focus (e.g., criminal defense, child custody, government benefits, small business development, etc.). Students are often working on similar cases, in part because the professor is able to control and manage their workload. Because the work is similar for all students, the clinic director can use a seminar component to teach specific skills, law and procedures that will be common to all students' experiences. Mary Jo Eyster, *Designing and Teaching the Large Externship Clinic*, 5 CLINICAL L. REV. 347, 350-51 (1999).

inar class would enhance the students' experience in the course or the quality of their work in the field. A professor could teach sessions on particular skills, such as direct examination, or particular aspects of prosecutorial ethics, such as the prosecutor's duty to disclose exculpatory evidence.[26] Sessions on skills development could serve as the foundation for advanced classroom work on skills, for clinical reflection on when and how those skills should be used in the field and for self-development by the student.[27]

B. The Problems with a Contemporaneous Classroom Component and the Benefits of Front-Loaded Instruction

Having articulated why a classroom component can be an important aspect of a prosecution externship or clinic, I will now turn my attention to the problems associated with a *contemporaneous* seminar component. By a "contemporaneous seminar," I envision a class which meets for two hours, once a week for each week of the semester. This is the structure of a traditional seminar, after all, so it would not be unusual for a clinic class to be scheduled in this format as a default.

The problem with a traditional, two-hour weekly seminar is that it assumes that an even rate of delivery is the best way to achieve the educational goals of the course. I would agree with this assumption if clinics and externships were traditional seminars with traditional educational goals. Consider a "traditional" seminar, such as "Death Penalty Law." A two-hour weekly seminar in such a course makes sense because the main goal of such a course is to enhance students' knowledge of the subject: capital litigation. The purpose is not to have students *do* anything. Time is, thus, not of the essence. In fact, classes must be spread out in order to give students the time and ability to read cases, absorb class discussions and learn the mate-

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[26] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[27] Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275, 283 (1996) ("Learning and training in basic lawyering skills and values is foundational in skill development and readies the student for the next step, the art of application.").

rial in preparation for a final exam or scholarly writing.

My argument in favor of boot camps challenges the traditional assumption that law school courses must be taught using an even rate of delivery. Rather, I believe that the rate and timing of instruction should be determined by the educational values and pedagogical goals of the course. If the course can be more effectively taught in a front-loaded fashion (or back-ended, for that matter), then it should be.

So the question becomes: Can a clinic or externship, particularly one involving criminal prosecution, be more effectively taught by including a front-loaded, "boot camp" component?

We have our students for only a limited amount of time in the clinic. One or two semesters is not a lot of time to teach skills, substantive law, procedure, ethics and professionalism.[28] By the time students are taught the basics of lawyering in a clinic, the semester is nearly over.

Coupled with the problem of limited time is the dilemma that everything, it seems, needs to be taught in the first week of a clinic.[29] If one is handcuffed to spreading out instruction over the course of fourteen evenly-spaced class sessions, then students' work with cases will likely suffer. For example, a seminar might be structured such that a class on interviewing can only be taught late in the semester. What if students need to know how to interview a witness or client in the first few weeks and throughout the entire semester? This, in turn, means that either the representation of the client will suffer or the supervising attorney has to pick up the slack.[30] For the

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[28] For schools on a semester or year-long basis, things are somewhat easier. Professor Kanter et al. pointed to the compressed nature of Northeastern's quarter system as an impediment to learning in their domestic violence clinic. Lois H. Kanter et al., *Northeastern's Domestic Violence Institute: The Law School Clinic as an Integral Partner in a Coordinated Community Response to Domestic Violence*, 47 LOY. L. REV. 359, 378, 391-92 (2001). Northeastern's unique co-op system means that law school courses are taught on a quarter system. *Id.* at 377. Each quarter is only twelve weeks long. *Id.* The traditional law school semester is fourteen to sixteen weeks long.

[29] Eyster, *supra* note 25, at 350 ("I was typically confounded by the perceived need to teach all of the material in the first week so that my students could actually get down to work.").

[30] Of course, if the skill is so critical, the professor could move it to the be-

reason that students usually do not start off a clinic with the necessary skills, Professor Hoffman suggested that the supervision of students in a clinic must necessarily start off intensely at the beginning, and gradually ease off until the attorney merely serves as a safety net.[31]

What if, instead, the necessary instruction in basic skills, ethics and law was front-loaded? The benefit to students and clients is obvious. Assuming a sufficient rate of retention from boot camp,[32] clinicians or field supervisors can expect a higher level of performance from students once they begin their casework.[33] Stated conversely, students who do not receive this instruction at the beginning of a course must be handheld and taught on an individual basis—a time-consuming and inefficient means to teach skills or substantive knowledge.[34] In an externship setting, it has been my experience that this can lead to frustration and lack of "buy-in" by field supervisors. Finally, when the class eventually does arrive at the point of a semester where a particular skill or doctrine is taught, the professor may encounter a sense of apathy and disinterest by students since, after all, they have already "been there and done that." Simulations and classroom instruction at this point can be viewed as meaningless, irrelevant or uninformed by the "real world," which students believe they have had sufficient exposure to.[35]

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ginning. That may involve pushing back an equally important subject, however.

[31] *See generally* Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277.

[32] This, I acknowledge, is a potential downside to boot camps. Students may not remember what they learn in boot camp. In the alternative, they may not have the appropriate context to understand what they are being told. For these reasons, it is important that *what* is taught in a boot camp be considered carefully. *See infra* Part II.

[33] Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 237-38 (1996) (discussing the importance of a minimal orientation "so that [students] will not be totally ignorant when they meet their clients").

[34] Eyster, *supra* note 25 at 350 (discussing the necessity of having to teach so much so early in a class).

[35] Fell, *supra* note 27 at 296. In contrast, I think students are more likely to be receptive to instruction and simulated exercises in a "boot camp" scenario. They have a distinct incentive to pay attention and take the material seriously: in a few days or weeks, they will hopefully be performing the very same skills

The best clinical experience results when a student is able to be independent, practicing the exercise of his or her own judgment.[36] Much of what externship and clinical professors teach in a classroom component has direct impact and bearing on students' field experience. The skills, substance and perspective that we teach in a companion seminar is often designed to assist students in being better externs or student attorneys. Frontloading instruction, either in the form of a boot camp or by rearranging a semester's schedule such that the class meets more often in the beginning weeks of a class, assists students in becoming more independent. This, in turn, means that they will get better experiences in the field and supervisors can spend more time supervising rather than instructing on basic skills.[37]

Having a boot camp does not mean that the professor must give up on engaging in clinical reflection with students. For externships, the ABA requires some degree of reflection on the field placement experience.[38] By front-loading instruction on skills or substantive law, it frees the professor to use seminar meetings during the semester for reflective dialogue. In this respect, a boot camp merely represents the "rearranging" of a seminar component of an externship or clinic. I have not used my boot camp to replace the contemporaneous seminar. Instead, the front-loading of skills training enables me to devote more time during the semester for reflection.[39]

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they are learning in class.

[36] William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 487 (1995) ("Clinical education is partly based on the premise that the more independence the student can assume in representing people, the better their learning will be.").

[37] Students *learn* more when they can *do* more. Quigley, *supra* note 36, at 486 ("Clinic teachers want their students to independently assume as much authority and responsibility for their cases as they can handle.").

[38] ABA STANDARDS Std. 305(e)(7).

[39] As already indicated, it has been my practice to give students "credit" for boot camp by canceling classes towards the end of the semester. I do so because otherwise students would spend a disproportionate number of minutes in the classroom per credit hour, as compared to other courses.

C. *Prerequisites as an Alternative?*

Some have argued that it is not the purpose of a seminar or classroom component to teach or train students about everything they will need to know to perform their new roles effectively.[40] The argument has been advanced that prerequisites can be a more effective way to ensure that students begin their clinical experiences in a competent fashion. This can be a way around the "everything needs to be taught in the first week" problem that Eyster and Schrag have noted.[41] Prerequisites are simply a way to *completely* front-load that portion of a seminar which the instructor deems to be essential to students' performance in their clinic- or field-work.

To the early clinicians funded by the Council on Legal Education for Professional Responsibility (CLEPR),[42] the classroom component was viewed as an essential mechanism to impart skills which were not being taught elsewhere in the traditional law school curriculum.[43] Now that many law schools have courses on interviewing, counseling, alternative dispute resolution[44] and trial advocacy,[45] why is it necessary

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[40] Fell, *supra* note 27, at 295.

[41] Eyster, *supra* note 25, at 350; Schrag, *supra* note 33, at 237.

[42] This was a funding program from the Ford Foundation for law school clinics in the 1960s. The program was ultimately called the Council on Legal Education for Professional Responsibility (CLEPR). Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 821 n.26 (2004).

[43] Fell, *supra* note 27, at 278.

[44] In building a mediation clinic at California Western, Professors Einesman and Morton elected to make a course in ADR a prerequisite. Floralynn Einesman & Linda Morton, *Training a New Breed of Lawyer: California Western's Advanced Mediation Program in Juvenile Hall*, 39 CAL. W. L. REV. 53, 58 (2002). Nevertheless, they also included a fifteen-hour, intensive training at the beginning of their clinic semester. *Id.* at 59.

[45] ABA standards for accreditation require instruction in skills. ABA STANDARDS Std. 302. Standard 302 currently states: "All students in a J.D. program shall receive . . . instruction in . . . skills . . . generally regarded as necessary to effective and responsible participation in the legal profession. . . . A law school shall offer in its J.D. program . . . adequate opportunities to all students for instruction in professional skills." *Id.* A proposed amendment, pending consideration at press-time by the ABA House of Delegates would provide, "A law school shall require that each student receive substantial instruction in . . . other professional

for clinic seminars to be so focused on skills development? If students can learn skills elsewhere in the curriculum, why duplicate efforts in the clinic?[46]

Professor Fell argues that "[t]he time for skills training is before the student enters the clinical phase of his or her practical legal education."[47] Other courses are better at teaching skills than small clinic or externship seminars, he says.[48] He prefers having students enter his clinic ready with the necessary lawyering skills from other courses.[49] This "frees substantial time for [the] clinical educator to engage more students and to focus on the clinic's unique job, educating students in the 'art of lawyering.'"[50] There is something quite appealing in Professor Fell's argument that "[a] marked characteristic of beginning clinical students is their inability to use what they know. ... It's not that they don't know it. They just don't know that they know it."[51]

The problem with Professor Fell's argument for wider use of prerequisites is not its underlying theory, but its application.[52] Relying on prerequisites to prepare students for clinical work is problematic from a practical standpoint. First, students may not have had the opportunity to register for such courses, either because they were not offered, they were full, or they too had prerequisites which the student had not yet completed. At

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skills generally regarded as necessary for effective and reasonable participation in the legal profession." *Sebert Memorandum*, *supra* note 14.

[46] Fell, *supra* note 27, at 295.

[47] *Id.* at 296.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 296.

[52] In theory, his position is quite persuasive: Clinicians and externship supervisors should not have to teach basic skills and substantive law from the ground up. It wastes time, results in poor work product from the student until skills can be taught, and is inefficient. Other courses in the law school, taught in a more traditional manner, can more effectively teach the doctrine and tools of lawyering to more students. In fact, these same reasons support the front-loading of a seminar component, even to the extent of doing a "boot camp" as described in the next section. Thus, to the extent that Fell says students should not begin representing clients unless and until they have the necessary skills, I agree with him.

Texas Tech, skills courses often have long wait lists and priority for them is given to third-year students. At Georgetown, where I got my J.D., students cannot take both a clinic and the trial practice course.[53] Second, students may not know whether they want to take a certain clinic or externship until late in their second year. By then, it will have been too late for them to register for prerequisites. Third, students are sometimes unable—or unwilling—to take more than one or two skills courses before they graduate.[54] Finally, and quite significantly, are the problems of retention and consistency. Students in clinic may not remember what they learned in prerequisites because of the temporal distance between the courses. Alternatively, those prerequisites may have been taught inconsistently with the clinician's or externship supervisor's practice.[55]

The notion of a clinic or externship as a "capstone" to a student's legal career is enticing but, in the end, not workable. Professor Bradway, in his early writings on clinical legal education, described clinic as a synthesis of all the work done in law school.[56] He operated his clinics on the assumption that stu-

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[53] *Clinic Enrollment Policies, at* http://www.law.georgetown.edu/clinics/ClinicEnrollmentPolicies.htm (revised Feb. 9, 2005).

> If a student has taken or is currently enrolled in Civil Litigation Practice, Patent Trial Practice, Trial Advocacy and Practice, Trial Practice-Expert Witnesses, or any section of Trial Practice, that student may not also enroll for credit in CALS, Criminal Justice, Domestic Violence, Family Advocacy, Juvenile Justice, or Law Students in Court (or vice versa). If a student has taken or is currently enrolled in the Appellate Practice Seminar, that student cannot also enroll for credit in the Appellate Litigation Clinic (or vice versa).

Id.

[54] Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 277 (1992) (noting that while many law schools offer courses that collectively, but not individually, cover most of the skills and values in the MacCrate Report, few students take more than one or two of these courses).

[55] Arguably this is not a bad thing. Students who are exposed to a variety of theories and practices in the use of skills are thereafter able to draw upon that variety to come up with their own identity and voice. They learn that there is no "right way" of doing things and that they must use their own independent judgment.

[56] John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. CAL. L.

dents had learned—and, presumably, had retained knowledge of—certain basic doctrines and skills.[57] Prerequisites, however, have little value if students do not take them or remember much from them.[58]

D. Particular Skills in Prosecution Clinics and Externships

The traditional, once-a-week two-hour seminar is not well-suited for prosecution clinics and externships. In placement-style prosecution externships, the field supervisors are usually full-time practicing assistant district attorneys with busy caseloads. They do not have the time or resources to train students extensively. Case supervision is hard enough for supervisors; teaching skills or substantive knowledge is an additional burden that we should not ask of busy prosecutors. Criminal prosecution, particularly at the misdemeanor or petty violation levels, is a highly technical, procedure-focused and routine practice. Junior prosecutors typically have a volume practice, where they handle many cases over a period of time, many of which contain similar issues of facts and law. Prosecutors have their own lingo to describe the actions on these cases. The quicker students learn the procedure and language of misdemeanor prosecution, the quicker they can learn and practice the more important skills and values such as making charging

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REV. 320, 320 (1930) (discussing how students should draw upon the skills and doctrine learned in the first two years and apply it to their work in the clinic).

[57] John S. Bradway, *The Classroom Aspects of Legal Aid Clinic Work*, 8 BROOK. L. REV. 373, 374-75 (1939) (explaining that the purpose of clinic was not to teach skills but to fill in the gaps left by other courses, particularly with respect to out-of-court advocacy and negotiation). .

[58] There is, of course, a school-by-school analysis which must be undertaken to determine if prerequisites can be a more effective way of teaching skills. Several schools have experimented with changes to their curricula to organize and improve their skills training. *See, e.g.*, *Mercer University School of Law: Woodruff Curriculum*, *at* http://www.law.mercer.edu/academics/woodruff/index.cfm (last visited Jan. 14, 2005) (describing Mercer's Woodruff Curriculum, which uses a series of required courses to build advanced skills training on foundational courses in substantive law and skills); *Case Law School—Curriculum*, *at* http://lawwww.cwru.edu/curriculum/content.asp?id=398 (last visited Jan. 14, 2005) (describing Case Western's new Case*Arc* curriculum which integrates a variety of skills training throughout the entire J.D. degree).

decisions, deciding on plea offers, and trying a case to verdict. If a professor waits until the end of a semester to explain what a "2255"[59] is, how to litigate a "PNC,"[60] or how to interview a police officer, the students will not have obtained the best experience possible.

E. Is There a Duty to Provide Pre-Semester Instruction?

There is an additional reason why a pre-semester boot camp is desirable in a prosecution externship: A law school has a duty to the public and the prosecutor's office to ensure that students are serving the State in a competent and ethical fashion. This is particularly true in an externship setting where the clinic director cedes day-to-day supervision of the students to assistant district attorneys.

I propose that law schools have a duty to ensure that externship students are qualified to undertake basic tasks in that particular office. That is, law firms, agencies and judicial chambers should not be dumping grounds for students who do not have the necessary skills, tact or knowledge to undertake the work of the given placement. Field placements have neither the time, resources nor experience to bring students "up to speed." Of course, the whole point of an externship program is to enable students to learn and grow as future lawyers. It would be unreasonable to require students to enter an externship with the ability to do everything the externship requires perfectly. Nevertheless, field placements have a legitimate right to expect students to enter with a minimum set of skills and knowledge because of the demands that an externship program places on the field supervisors. Before going to a prosecutor's office, students should know how a typical criminal case proceeds through the judicial system, what

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[59] *See* 28 U.S.C. § 2255 (2004) (motion for habeas-style relief from illegal confinement).

[60] PNC stands for "plea negotiation conference" and is used in Lubbock County, Texas, to force prosecutors and defense attorneys to try to negotiate a plea agreement before a case is set for trial. *See* LUBBOCK COUNTY, TEX., LOCAL RULES, R. 5.20(G), *available at* http://www.co.lubbock.tx.us/DClerk/PDF/LocalRules.pdf (last visited Jan. 16, 2005).

the role of the prosecutor is (the prosecutor represents the State, not the victim) and how to talk to people (witnesses and court clerks especially). From there, prosecutors can work with students to use these skills and pieces of knowledge in a coherent fashion. A student who enters an externship not knowing what a prosecutor does, not knowing the structure of the court system, and not having basic skills in asking questions of witnesses and attorneys, is likely to be handed a stack of papers to photocopy. It is unreasonable to ask field supervisors to teach students everything about being a lawyer. We have a duty to send them students with a set of minimum, basic skills.

ABA Standard 305(e) only requires externship programs to provide "opportunities for student reflection on their field placement experience."[61] This narrow requirement omits the possibility of using a classroom seminar to prepare students for the work they will do in the field placement. Better prepared students will get better work.[62] Better work, in turns, leads to greater educational value and the type of reflection that the ABA seeks. When I was a prosecutor, I supervised externs from nearby law schools. It was my experience then, and later as a professor, that the students who were able to "hit the ground running" in their placements were more likely to argue cases in court, interview witnesses and do the other types of meaningful prosecutorial work that lead to positive educational experiences.

This duty that I write about here exists to benefit the students, the overall program in perpetuity, and the field placement agencies themselves who are, by definition, partners in the externship experience.

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[61] ABA STANDARDS Std. 305(e).

[62] A corollary to this is that better-prepared students are more likely to impress supervisors, get meaningful letters of recommendation, and even further their careers within the field placement itself.

F. Other Benefits of Front-Loaded Instruction

Boot camps enhance students' learning experiences by enabling them to assume independence early in their field work.[63] I have found, as both a student and professor, that front-loaded instruction and boot camps can have other, significant benefits. For example, a boot camp can have a camaraderie-building effect on a class, in the same way that the military's boot camps can have a cohesive and team-building effect on a set of recruits. As a student at Georgetown, I found that my fellow clinic students and I "bonded" quickly during boot camp.[64] In our first week of clinic, we spent about 40 hours together, often in small group exercises.

As a professor, I have noticed that my students have been more comfortable communicating with each other and with me following boot camp. They grow to know each other quite well and feel more at ease in going to each other for help with problems or concerns. I usually include a fun social event at the end of boot camp to "reward" them for completing the experience. In the fall, I had a barbeque. In the spring, I hosted a happy hour at a local restaurant.

III. Boot Camps as a Workable Component of a Clinic or Externship Seminar

If a professor decides that a boot camp might be beneficial to his or her clinic or externship program, there are some initial questions that need to be answered about the type of boot camp which will be offered and how such a program will work.

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[63] The term "boot camp" has also begun to catch on in the marketing of continuing legal education seminars. Michigan's Institute of Continuing Legal Education has begun to market seminars for newer attorneys as "boot camps." *See Institute of Continuing Legal Education—Anonymous*, *at* http://www.icle.org/scriptcontent/ICLE_index.cfm?section=home (last visited Jan. 15, 2005).

[64] At the time, we also formed camaraderie in complaining about boot camp due to the intensity of the experience.

A. Types of Boot Camps

Front-loaded instruction can take various forms, depending on the instructional needs of the particular clinic or externship program. I have identified four different types of boot camps or orientation periods: (1) administrative; (2) substantive; (3) skills; and (4) mixed.

1. Administrative Model

One use of a boot camp is to instruct students on the administrative workings of the clinic or externship and to discuss basic "housekeeping" matters. Such an orientation period could be short and would require minimal planning, but could provide students with the minimum, practical knowledge that they would require in order to "hit the ground running." Students could be instructed on a range of topics from requirements of the course to usage of the office equipment.

One of the earliest writers on clinics, Professor Bradway, suggested in a 1930 article that the first order of business for any clinical program is to give students an orientation to the routines of the office, a statement of purpose of the course, and to distribute the office manual.[65] This session, he said, should occur before students begin any substantive work on cases or projects.[66] Professor Grossman similarly argued that "an orientation program prior to fieldwork" can provide students with "how-to" information on office procedures, but can also focus students on understanding their new roles.[67]

Several modern-day clinics use an administrative boot camp to further the instructional goals of their courses. Professor Caplow described how she uses an orientation class in a judicial clerkship clinic to tell students about the course requirements, give them an orientation to the court system, discuss guidelines concerning confidentiality and supervision and

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[65] Bradway, *supra* note 56, at 323.

[66] *Id.*

[67] George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 186 (1974).

to deliver a "pep talk" on the importance of the work they about to do.[68] The first four weeks of her seminar course are then devoted to skills development.[69] Thus, while her orientation class gives student a very basic overview of what will be expected of them, the heart of her instruction on skills occurs while students are in the early stages of their externship experience.[70]

Professor Schrag, in his seminal work, *Constructing a Clinic*, devoted a portion of his article to a discussion of orientation programs in clinics.[71] After concluding that an "early orientation may be the best way to get a clinic off to a fast start," he describes the contents of his orientation program for the Center for Applied Legal Studies at Georgetown.[72] His orientation program would be best characterized as "administrative." He has students introduce themselves to each other and then go through a series of ice-breaking exercises.[73] Students pair off into partnerships for the purposes of their work in the clinic.[74] He then discusses the typical progress of a case through the asylum process, sprinkling in a brief description of the substantive law that governs their cases.[75] He then assigns cases to the pairs, distributes course materials, and concludes with a party.[76]

An administrative boot camp appears to be relatively easy to run. Little substantive preparation is required of either the professor or the student. It allows for the completion of a number of "housekeeping" tasks (creation of student partnerships, distribution of materials, discussion of office procedures) to enable the clinic or externship to get started on substantive matters in week one. The downside to an administrative boot

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[68] Caplow, *supra* note 8, at 890 n.57.
[69] *Id.* at 890-91.
[70] *Id.* at 891.
[71] Schrag, *supra* note 33, at 237.
[72] *Id.* at 175, 237.
[73] *Id.* at 237.
[74] *Id.*
[75] *Id.* at 237-38.
[76] *Id.*

camp is that it lacks the ability to train students on the substantive skills or knowledge which they will need to be effective clinical students. They may know how to use the computer to generate forms and where completed paperwork should go, but they will have little idea about what should go in those forms and why. Those discussions must be saved for later in the semester, either in week one or beyond.

Two of my clinical colleagues at Texas Tech use an administrative boot camp in their civil clinic. Students meet for two hours with the clinic director and office manager on the day before classes start. They discuss office procedures and the office manager instructs the student on the use of our clinic's case management software.

2. *Substantive Law Model*

Another way to use a boot camp is to teach substantive law that students will need early in the course. A boot camp using this model would exceed the limited, practical information that is conveyed in the administrative model. Professor Bergman, who ran UCLA's Consumer Protection Clinic, advocated the use of clinical seminars to teach substantive law, not skills.[77] In his course, students served as externs in government agencies practicing consumer protection law.[78] There was a greater need to have students learn the substantive law of consumer protection as opposed to skills, since very little work in that field involves courtroom advocacy.[79] Professors Wizner and Curtis, who began a legal clinic at Yale in the early 1970s, believed that clinical seminars should teach skills, not substance.[80] They later discovered that clinic seminars are more effective if substantive law and public policy are taught instead.[81] Without a background in a particular subject matter,

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[77] Paul Bergman, *The Consumer Protection Clinical Course at UCLA School of Law*, 29 J. LEGAL EDUC. 352, 358-59 (1978).

[78] *Id.* at 352.

[79] *Id.* at 359.

[80] Stephen Wizner & Dennis Curtis, *"Here's What We Do": Some Notes About Clinical Legal Education*, 29 CLEV. ST. L. REV. 673, 683 (1980).

[81] *Id.*

they argued, students could not effectively represent clients.[82] Since their cases went to court so rarely, it was easier and more effective to teach advocacy skills on a one-on-one basis.[83] If one accepts the arguments by Professors Bergman, Wizner and Curtis, then it follows that clinics and externships that focus on substantive law in their seminars would likewise benefit from the use of front-loaded instruction. Their argument is simple: Students need to know the laws, regulations and cases which form the foundation of their particular area of work (e.g., Social Security, asylum, criminal defense). As with skills and administrative information, it can be detrimental to the educational mission of a clinic or externship to wait until midway or the end of a semester to hold classes on foundational, substantive concepts in the program's area of law.

There are some challenges associated with a seminar component that concentrates on substantive law, even in a boot camp setting. In an externship program, it can be difficult to find an educational "consensus" amongst the various placements.[84] One student may need instruction on consumer protection law, while others may be involved with criminal law, personal injury or access to government benefits. Finding common ground between these placements can be difficult. However, in a criminal prosecution clinic or externship, this task is easier. Even if students are working in different counties or cities, they all presumably need to know the same substantive law and procedure.[85]

Boredom is a challenge that must be faced in any front-loaded instruction situation.[86] Nevertheless, I believe this

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[82] *Id.*

[83] *Id.*

[84] Linda F. Smith, *The Judicial Clinic: Theory and Method in a Live Laboratory of Law*, 1993 UTAH L. REV. 429, 451-52 (describing how the myriad placements makes teaching substantive law in a judicial externship program difficult).

[85] An exception to this rule would be if some students are working for state prosecutors and others are working for federal prosecutors. Even then I think common ground could be found. For example, the law dealing with search and seizure, confessions and evidence tend to be similar between the federal courts and most state systems.

[86] Schrag, *supra* note 33, at 237-38.

problem is particularly true with boot camps or seminars using a substantive law model just by the nature of the material (which can be dry) and the typical mode of presentation (lecture or Socratic dialogue). If substantive law is to be taught in an accelerated, front-loaded manner, then the instructor should find ways to encourage participation and to make the experience enjoyable for students.

3. Skills Development Model

I see the greatest value in boot camps that work on skills development. Boot camps, because of the long periods of time in which students are available, are particularly suited to provide instruction and practice skills. It can be difficult to teach interviewing techniques in a fifty-minute block during the semester. Such a short time period leaves little room for instruction, practice and critique. What if, instead, the class had several hours to perform the same tasks, before the stresses of the regular semester have begun? Boot camps provide that flexibility by front-loading the instructional time. If done effectively, instruction in skills should not be boring. Skills classes afford greater opportunities for student participation, role playing, small group work and class discussion.[87]

There is a genuine need for skills instruction in clinical and externship courses because students usually get limited exposure to such instruction in other courses in the curriculum. While the curriculum as a whole may provide comprehensive instruction in myriad skills,[88] the problem, as noted by Professor Laser, is that students rarely take more than one or two of such courses beyond their first-year legal writing course.[89]

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[87] *Id.* at 238 ("If there is to be an extensive orientation, and particularly if students will perceive it as a burden, clinical supervisors might make special efforts to make it fun. They might make extensive use of some of the tools characteristically associated with clinical legal education.").

[88] For example, it may provide instruction in trial advocacy, interviewing, counseling, negotiations, mediation, writing and fact investigation.

[89] Laser, *supra* note 54, at 277. Why do students only take on average one or two skills courses? As noted earlier, skills courses are often low-enrollment and over-subscribed. Third-year students generally get preference for such courses for

Students, therefore, come to clinic with few of the necessary skills to be effective junior attorneys. Many of the skills and values[90] necessary for success in criminal prosecution can be effectively learned in a prosecution clinic or externship.[91]

There is also a need for skills instruction because semesters are short and students need to be able to "hit the ground running" in their clinic or field placement. This is a real, practical benefit to boot camps that work on skills development. Imparting basic skills *before* fieldwork begins is beneficial to students as well as clients or host agencies. Students feel less lost. They have confidence to know that they can fall back on the techniques they learned before the semester started. Having the ability to begin a new task with confidence means students can start their field education at a higher level. This also has benefits for the field supervisor or clinical instructor. The students' education can begin at a more advanced level. It more effectively uses supervisors' time and leads to additional buy-in by the host agency/placement. This is particularly true in prosecution clinics and externships, where the day-to-day supervisors are often overworked, underpaid civil servants. By making more effective use of their time by sending them students with basic skills, the overall externship or clinical program will be enhanced.

The Battered Woman's Clemency Clinic at the University of Colorado is an example of a clinic with a skills-based boot camp component.[92] Professors St. Joan and Ehrenreich created

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this reason. I wonder, too, if there is a perception amongst students that skills courses are not "real courses." I have heard faculty members express this view and I would wonder if such points of view have spilled over into the student body.

[90] *See* ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 135 *et seq.* (1992).

[91] Problem solving, factual investigation, communication, negotiation, litigation procedures, organization and management of legal work, recognizing and resolving ethical dilemmas and promotion of justice are all skills and values that are utilized by prosecutors on a daily basis. Many of the best prosecution clinics and externships attempt to bring many of these skills and values together.

[92] *See* Jacqueline St. Joan & Nancy Ehrenreich, *Putting Theory into Practice: A Battered Woman's Clemency Clinic*, 8 CLINICAL L. REV. 171 (2001).

a clinic to represent battered women who were convicted of murdering their batterers.[93] They used a three-day orientation period to give students basic skills to enable them to begin investigating their cases immediately.[94] They may have chosen this structure because of their experience that students had little experience or background in domestic violence issues. The initial classes were devoted to interviewing skills, client counseling, fact investigation and the psychological dynamics of domestic violence.[95] Students went on to build on the skills they learned in orientation. Subsequent subjects in the course included drafting clemency petitions, dealing with the media, and identifying ethical issues.[96]

An alternative to a pre-semester boot camp is to frontload the instruction during the first few weeks of the semester and either prohibit students from working on cases during that time or limit their fieldwork to a minimal level. This is the approach described by Professor Duquette, the director of Michigan's Child Advocacy Clinic.[97] During the first two weeks of his course, he teaches substantive law and procedure, basic skills, and special issues in the representation of children.[98] These first two weeks are designed to prepare students for clinical practice.[99] During this time, casework is kept to a minimum.[100] This approach seems ideal for a professor who wishes to do a boot camp but is unable to bring students back to

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[93] *Id.* at 172.

[94] *Id.* at 192.

[95] *Id.* at 192-93.

[96] *Id.* at 192.

[97] Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J. L. REFORM 1 (1997) (noting the Child Advocacy Clinic provides assistance to abused and neglected children, parents accused of abuse and area agencies seeking to obtain removal of abused children. The Clinic provides representation to these groups in separate counties to avoid conflicts of interest.).

[98] *Id.* at 22.

[99] *Id.* While there is some overlap between the classroom component and casework, Professor Duquette points out, "We believe that our close supervision insures that case service does not suffer by doing live cases and the classroom component concurrently." *Id.*

[100] *Id.*

campus before the semester starts. However, this approach would be more effective in a full-year clinic or externship program where the loss of two or three weeks of casework does not have a great impact on student learning or client representation.

Obviously the skills that are taught in a boot camp or even during the semester in the classroom component should have some bearing on the actual work that will be done by students in the field. Professor Bradway, for example, taught "out-of-court" skills such as counseling and negotiation in his civil clinics.[101] These were more valuable than "in-court" skills, such as trial advocacy, because students had very few cases that actually went to court, let alone went to trial.[102] This is another example of the importance of assessment. A clinic director should not start a boot camp just for the sake of starting a boot camp. There should be a pedagogical rationale for doing so.[103]

Not all clinical professors and externship supervisors agree that skills should be a focal point for a seminar component, let alone frontloaded in a boot camp. Professor Fell expressed in 1996 that skills could be more effectively taught in other class settings.[104] These skills courses should be made prerequisites for clinics or externship programs, he argues.[105] To be clear, Professor Fell's argument is *not* that skills are unimportant. In fact, his position is just the opposite—skills are valuable and necessary for students working in a field placement.[106] He takes the view, instead, that skills should be taught before a student begins a clinical or externship experience[107] (something I wholeheartedly agree with) through prerequisites

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[101] Bradway, *supra* note 57, at 374.

[102] *Id.*

[103] Eisinger, *supra* note 8, at 660 ("If the generic externship class can be taught, it should be taught voluntarily, for sound pedagogic reasons, because it genuinely adds value to students' experience in the field.").

[104] Fell, *supra* note 27, at 296.

[105] *Id.*

[106] *Id.*

[107] *Id.* ("The time for skills training is before the student enters the clinical phase of his or her practical legal education.").

(something I view as problematic).[108]

How does one handle the problem of students working in different placements? Like the Substantive Law Model, the Skills Instruction Model requires the professor to find some common ground between the field placements. In prosecution clinics and externships, for example, interviewing witnesses may be a common skill. If most students get to appear in court, then basic instruction on direct and cross examination, arguing motions and courtroom demeanor, might be in order. However, if jury trials are rare in a particular clinic, then the professor might choose to skip voir dire and instead coach students on a one-on-one basis if they in fact get a jury trial during the semester.

4. Mixed Model

The Mixed Model combines elements of the Administrative, Substantive Law and Skills Instruction models. This is the model that I use at Texas Tech and to which I was exposed to as a student at Georgetown. The reason why I created a Mixed Model at Texas Tech was because of the pedagogical needs of the program here. The schedule for my Fall 2003 Boot Camp is reprinted in the Appendix. The skills I identified included knowledge of post-bail procedures, charging decisions, litigating pretrial motions (including direct- and cross-examination skills) and orientation to the courthouse and prosecutor's office. Thus, the material I covered included administrative, substantive law and skills.

B. Administrative and Instructional Challenges

The benefits of a boot camp should be carefully weighed against the institutional and educational challenges to successfully implementing such a teaching mechanism.

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[108] *See supra* Part II.C.

1. Putting Students on Notice

Since a boot camp is a departure from the standard and even distribution of class meetings over a semester, students should be put on notice that the course will be front-loaded. This is especially true if students will have to come back to campus before regular classes start. Advanced notice that the course will meet on a front-loaded basis is necessary both for fairness and practical reasons.

How does one deal with the disgruntled student who does not want to cut his vacation short or is otherwise unable or unwilling to attend a previously disclosed boot camp? My answer to students is simple: Boot camp is a mandatory component of my clinic. If a student is unwilling or unable to attend boot camp, then he or she is not eligible to apply for the course. Does this turn some people off from applying to my clinic? Perhaps. Most students, I find, are cautiously intrigued by the idea of a full week of skills training, particularly when I tell them that they will be learning practical things that will help them as they begin their clinical work. In conversations with me after boot camp and after the course, students have generally expressed positive reactions, although many said they were initially terrified of the experience. Given that my clinics have always been oversubscribed, I am generally happy for any opportunity for students to self-select themselves out of the course.[109] I also impose a no-drop policy so students cannot back out of the clinic during or after boot camp, since it would not be possible to add a student from the wait list and have him or her go through boot camp.

2. Approval of the Associate Dean

Although the argument could be made that the decision to front-load a course is one of academic freedom, I think it is wise to seek the approval of the Dean's Office, particularly the Associate Dean for Academic Affairs, before implementing a boot camp. A professor interested in running a boot camp will

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[109] The ratio of applicants to slots in my clinic is generally 2:1.

need the assistance of the Associate Dean in scheduling classroom space and coordinating around other events at the law school.[110] Texas Tech's Associate Dean was very accommodating and willing to work with me. For example, he supported my "no-drop policy" and assisted with disseminating the policy to students during registration.

3. Preparation Time

A boot camp means more preparation for both the professor and the students. A new professor, in particular, should give careful consideration to the fact that a front-loaded period of instruction will require a front-loaded period of preparation and teaching. Prior to the start of my first year at Texas Tech, I negotiated with the Dean for a summer stipend to prepare for the start of the clinic in the fall. This enabled me to do all of my preparation for boot camp over the course of several months.

4. Time Away from Cases

An additional consideration for in-house clinics is the time commitment for a boot camp. A week-long boot camp will mean an entire week when the clinic will, in effect, be closed for business. Unless there are multiple clinical faculty who can cover cases for one another, the clinic will have to arrange not to have court hearings, client appointments or major deadlines during the week of boot camp.

5. Student Boredom

A week-long boot camp can be boring for students unless the professor takes steps to make the experience interesting. Professor Schrag suggested that an element of fun might be

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[110] At Texas Tech, my summer boot camp coincides with the first-year orientation program, a time when classroom space is at a premium. I begin planning the schedule for boot camp at the same time that the Dean's Office is planning the schedule for first-year orientation. Happily, the Dean's Office has been able to accommodate my space needs during boot camp.

introduced to reduce the likelihood of boredom.[111] "If there is to be an extensive orientation," he wrote, "and particularly if students will perceive it as a burden, clinical supervisors might make special efforts to make it fun."[112] He suggested using skits, videos, simulated exercises and small group discussions to liven up the students.[113]

In my boot camp, I use a mix of lectures, Socratic dialogue, role playing exercises, field trips and videos to keep students interested. I never lecture or use the Socratic method for more than an hour. I try to do at least one role-playing or practice exercise in the morning and one in the afternoon. Ample breaks and refreshments are provided. I also schedule a morning where we go downtown to the courthouse, meet the judges and the ADAs they will be working with, and visit the Clerk's office and jail.

6. Professor Burnout

A corollary to the problem of student boredom is the problem of burnout for the professor. A week, or even a few days, is a long period of time to be teaching all day. By the end of each day of boot camp, I am generally exhausted. Mixing up the schedule to include short periods of lecture followed by short periods of student activity (such as role playing) helps to recharge my energy stores. In clinics or externship programs with multiple faculty members or staff, professors should consider teaming up or alternating different components of boot camp. I suggest below that where there are multiple clinics at a law school, each with only one faculty member, the professors should consider joining forces to create a program-wide boot camp in which faculty could each teach a small portion of the front-loaded curriculum.[114]

In an externship, a possible solution to the problem of professor burnout is to enlist the aid of field supervisors to

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[111] Schrag, *supra* note 33, at 237.
[112] *Id.*
[113] *Id.*
[114] *See infra* Part IV.

teach part of boot camp. Field supervisors are particularly well-suited to teach office policies and local court procedure, and to evaluate skills exercises. Involvement of field supervisors has a number of distinct advantages. First, it frees the professor from having to teach all of boot camp. Second, it involves field supervisors early in the program. They will have a better idea of students' capabilities which, in turn, will lead to more carefully crafted assignments and feedback. Additionally, there is greater chance for buy-in by the field supervisors.

IV. Future Directions

Although I could find no comprehensive study on the use of boot camps in clinical legal education, anecdotal evidence suggests that a fair number of clinics and externship programs are front-loading instruction to meet the pedagogical needs of their courses.[115] Each semester, I re-examine the uses and purposes of the boot camp in my clinical course, I have begun to think about ways in which boot camps can be expanded, improved and further refined.

If a law school has several clinics, the directors should consider doing a collaborative boot camp to deal with the issues of burnout and exhaustion. For clinics that use a mix of lectures and practical exercises, it might be workable to have one professor teach a lecture on a particular subject (such as witness interviewing) and then have students break out into smaller groups, supervised by other faculty, to practice skills in forensic exercises. This would work if the material being taught has crossover potential amongst the various clinics. The entire clinical program at a law school may not be able to collaborate for the entire portion of a boot camp, but perhaps a few commonalities could be found to do some joint teaching.

Another possibility to consider is the frontloading of the entire seminar component of a clinic or externship course, not

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[115] This conclusion was drawn from an informal survey of the LAWCLINIC-listserv as well as participants in the Works-in-Progress Concurrent Session at the AALS Conference on Clinical Education in San Diego, California, in May 2004.

just a portion. Students would enroll in a particular course during the semester before they entered the field as clinical students or externs. This alleviates the "perceived need to teach all of the material in the first week so that ... students could actually get down to work."[116] This is the format used by the University of Georgia's Criminal Prosecution Clinic:

> The clinic is a three semester program. During their first semester, students learn criminal law and procedure, trial skills, and evidence in a mock setting. In their third year, students are certified as Student District Attorneys. They prepare and try both misdemeanor and felony cases. They appear before grand jury, conduct preliminary and motion hearings, and prepare all necessary paperwork including appeals.[117]

There are some downsides to this approach. Students must commit themselves early in their law school careers to participating in this particular clinic/externship. There is also the problem of retention of learned material through the summer and into the fall and spring semesters of the third year.

CONCLUSION

When implemented as part of a comprehensive and well thought out educational program, boot camps or front-loaded classes can serve a valuable function in clinics and externships. Prosecution programs can especially benefit because of the need for immediate immersion in basic advocacy skills.

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[116] Eyster, *supra* note 25, at 350.

[117] University of Georgia School of Law, *Student Handbook*, *at* http://www.law.uga.edu/facstaffstu/students/handbook/course.html (last modified June 3, 2004).

Appendix
Texas Tech Criminal Prosecution Clinic Boot Camp Schedule

Wednesday, August 20, 2003

9:00-9:15	Introductions
9:15-10:15	Theory and Practical Exercise: Case Analysis and Strategy
10:15-10:30	Break
10:30-10:45	Theory: Sentencing Arguments
10:45-11:45	Practical Exercise: Sentencing Hearings
11:45-12:45	Lunch Break
12:45-1:30	Theory: Witness Interviews and Direct Examinations
1:30-1:40	Break
1:40-3:00	Practical Exercise: Interviews

Thursday, August 21, 2003

9:00-10:30	Practical Exercise: Direct Examinations
10:30-10:45	Break
10:45-11:30	Theory: Cross Examinations
11:30-12:30	Lunch Break (and preparation for cross examination exercise)
12:30-2:00	Practical Exercise: Cross Examinations

Friday, August 22, 2003

9:00-12:00	(Meet at DA Office) Court Tour DA Office Tour Meet Judges Misdemeanor Procedure Paperwork Flow
12:00-1:15	Lunch Break
1:15-1:45	(Meet at Law School) Theory: Case Disposition
1:45-2:15	Practical Exercise: Case Disposition
2:15-2:30	Clinic Procedures
6:00- ?	BBQ/party at Prof. Cunningham's house

THE UNIVERSITY OF SAN DIEGO CRIMINAL CLINIC: IT'S ALL IN THE MIX

Jean Montoya[*]

Although many legal educators would place the birth of clinical legal education in the 1960's, legal scholars have convincingly traced it to the early twentieth century.[1] Nevertheless, in the wake of *Gideon v. Wainwright*,[2] and its progeny,[3]

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[1] *See* Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 6-12 (2000) (describing the history and future directions of clinical legal education). For seminal articles on the need for clinical legal education, see Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PENN. L. REV. 907 (1933) (criticizing the Langdellian approach to legal education); William V. Rowe, *Legal Clinics and Better Trained Lawyers–A Necessity*, 11 ILL. L. REV. 591 (1917) (advocating clinical legal education as instrumental to building professional character).

[2] 372 U.S. 335 (1963) (holding that the Sixth Amendment, applicable to the states through the Fourteenth Amendment, requires states to provide attorneys for indigent defendants in criminal prosecutions). In *Gideon*, the defendant was charged with a felony and requested the court to appoint counsel for him. *Gideon*, 372 U.S. at 336-37. The court apologetically declined to do so, indicating its authority was limited to appointing counsel in capital cases. *Id.* at 337. The defendant represented himself at trial. *Id.* He was convicted and sentenced to serve five years in state prison. *Id.* For a retrospective and prospective analysis of *Gideon*, see Yale Kamisar et al., Gideon *at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135 (2004) (recording a moderated panel discussion).

[3] *Argersinger v. Hamlin*, 407 U.S. 25 (1972), clarified *Gideon* by holding that no person may be imprisoned for any offense, whether petty, misdemeanor, or felony, unless he was represented by counsel at trial. *Argersinger*, 40 U.S. at 25. In *Argersinger*, the defendant was convicted of carrying a concealed weapon and sentenced to serve ninety days in jail. *Id.* at 26.

law school criminal clinics in particular proliferated.[4]

The University of San Diego (USD) offers law skills training through a variety of legal clinics, including its Criminal Clinic. In response to *Gideon's* trumpet, USD's Criminal Clinic first appeared as a course offering in 1973,[5] but the current course is the product of an evolutionary process. The current Criminal Clinic is neither a prosecution clinic nor a criminal

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[4] In *Argersinger*, the Court emphasized that the high volume of misdemeanor and petty cases inevitably leads to rushed justice and that the presence of counsel in these cases is critical to insuring fair trials. *Id.* at 34-37. In a concurring opinion, Justice Brennan observed that law students in law school clinical programs could be expected to play an important role in providing legal representation to indigent criminal defendants. *Id.* at 44 (Brennan, J., concurring); *see* Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853 (1996) (studying the effectiveness of student defenders and concluding that they provided better representation than professional defenders in terms of results achieved and the nature and quality of representation).

[5] Rodney Jones, currently in private practice in California, joined the USD law faculty in 1973. Telephone Interview with Rodney R. Jones, former faculty member, University of San Diego School of Law (Sep. 1, 2004). The then law school dean, Don Weckstein, charged him with developing an in-house Criminal Clinic. *Id.* With grants from the Ford Foundation and later from Title IX programs, Jones developed an in-house Criminal Clinic. *See* Barry et al., *supra* note 1, at 18-20 (describing the funding available for clinical legal education from 1959 to 1997). Although Jones toyed with the idea of obtaining special prosecutor status and developing a prosecution clinic, the clinic offered defense services only. Telephone Interview with Rodney R. Jones. Walk-ins, San Diego State University students (by contract), jail inmates with post-conviction problems (motions to modify probation, but not appeals or petitions for writs), referrals from USD's Civil Clinic and court appointments provided the client base. *Id.* From its inception, the Criminal Clinic had a class component that examined select topics. Eventually, the law school would offer prosecution and defense externships too. *Id.*

For perspectives on criminal clinics from this time in clinical education's history see C. Paul Jones, *Law School Clinical Programs: The View from the Defender's Office*, *in* CLINICAL EDUCATION FOR THE LAW STUDENT 181 (1973) (arguing that law students in criminal clinics have an important role to play in reforming the criminal justice system) and Robert D. Bartels, *Clinical Legal Education and the Delivery of Legal Services: The View from the Prosecutor's Office*, *in* CLINICAL EDUCATION FOR THE LAW STUDENT 190 (1973) (arguing that benefits outweigh costs to prosecution agencies participating in law school prosecution clinics). For example, in 1973, Professor Bartels noted "a fairly widespread feeling among law students that there is someting [sic] inherently bad about prosecuting people." *Id.* at 210. The pendulum may have swung. In the wake of the tough-on-crime politics of the 1980's and 1990's, I have found law students more inclined to prosecute than defend criminal defendants.

defense clinic. Instead, it brings together students who fancy themselves future prosecutors and future criminal defense attorneys.[6]

I. The Structure and Content of USD's Criminal Clinic

Criminal Clinic I is a four-credit course consisting of two distinct components: the externship component and the class component.[7]

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[6] I do not know how many law school criminal clinics are defense-only clinics, as opposed to prosecution-only clinics, or clinics that bring together student-prosecutors and student-defense attorneys. Clinic designations are often vague in that regard. For example, the designations "Criminal Practice Clinic" and "Criminal Justice Clinic" tell us little. *See* Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 Clinical L. Rev. 413, Appendix B (1996) (reporting a nationwide survey of externship programs).

Criminal clinics certainly take many forms. Professor Fell has described the Criminal Clinic at Thomas M. Cooley Law School as combining externship and class components. *See* Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 Clev. St. L. Rev. 275, 291-93 (1996). The Cooley clinic, however, only placed students in defense externships at a single public defender's office. *Id.* at 292. As will be described further below, USD's Criminal Clinic uniquely places students in a variety of both defense and prosecution externships. Professor Subin described the Criminal Law Clinic at New York University (NYU) as combining fieldwork and classroom work. *See* Harry I. Subin, *Clinical Pedagogy—The Educational Program of the New York University School of Law Criminal Clinic*, *in* Clinical Legal Education 254 (1980). The NYU clinic, however, involved a live-client, in-house clinic, not externships, and student fieldwork was limited to criminal defense. *Id.*

[7] The prerequisites for Criminal Clinic I are Criminal Law (a required first year course focusing on substantive law and the philosophical justifications for punishment), Lawyering Skills I (a required first year class on legal research and writing), Lawyering Skills II (an upper division elective exposing students to a variety of lawyering skills, including trial skills, and culminating in a mock jury trial), Criminal Procedure (an upper division elective focusing on the Fourth and Fifth Amendments), and Evidence (an upper division elective emphasizing the Federal Rules of Evidence). Because of the numerous prerequisites, most students who take Criminal Clinic will be third year law students.

Students who complete Criminal Clinic I can enroll in Criminal Clinic II for two, three, four, five or six credits. Students extern with a defense or prosecution agency four hours per week per class credit, for fourteen weeks. Accordingly, a student taking Criminal Clinic II for six credits will spend twenty-four hours per week for fourteen weeks with an approved agency. The Criminal Clinic II externship must be materially different from the Criminal Clinic I externship. Originally that meant students externing with a prosecution agency for Criminal Clinic I would extern with a defense agency for Criminal Clinic II or at least extern at a different prosecution agency (perhaps go from the District Attorney's

A. The Externship Component[8]

In the externship component of the course, students engage in legal work at the local office of a criminal defense or prosecution agency.[9] Six government agencies regularly participate in the program.[10] Students seeking a Criminal Clinic

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Office to the U.S. Attorney's Office). The requirement has since evolved to include remaining at the same agency (for example, the District Attorney's Office) but changing units (going from the gang unit to the family protection unit or a branch court office) or obtaining a commitment from the agency to expose the student extern to different skills or stages of criminal litigation. For example, a Criminal Clinic I externship may have exposed the student extern to bail, motion and sentencing hearings, but the Criminal Clinic II externship will expose the student extern to trials. Criminal Clinic II has no class component. Students meet individually with the course instructor each month, maintain a journal and write a reflection paper.

Every year, Criminal Clinic I and II are offered both semesters.

[8] Students gain important resume-building experiences in live-client, in-house clinics, externships and internships. At USD, externships are distinguished from live-client, in-house clinics and internships as follows. Students enrolled in live-client, in-house clinics provide legal services to clients of the law school clinic and receive academic credit from the law school for their efforts. Students enrolled in externships are placed with a legal office independent and separate from the law school, provide legal services to clients of that office and receive academic credit from the law school for their efforts. Externships differ from internships in that externship experiences are organized and supervised by the law school. Internship experiences are organized and supervised by the independent and separate legal office. Students may receive academic credit for their internship experiences through USD's Agency Internships program. The current USD Criminal Clinic involves externships at preapproved agencies.

[9] USD places students at the local offices of government agencies primarily engaged in criminal trials and related litigation. We have shied away from allowing students to work for private criminal defense attorneys or government agencies doing primarily appellate work (like Appellate Defenders, Inc., or the State Attorney General's Office). Our concern with respect to the private criminal defense bar is a matter of quality control. As it stands, the course instructor monitors supervising attorneys at six agencies, but a chain of command and liaison at each agency facilitates the on-going relationship between the law school and the agency. Allowing students to extern with the private criminal defense bar would greatly increase the faculty time expended on the monitoring of supervising attorneys. Our concern with respect to appellate agencies was that appellate advocacy involves procedures and skills that could not be addressed adequately by the class component of the course. An upper division course in appellate advocacy is available to interested students.

[10] San Diego has a significant military presence. In addition to the six regular agencies, USD students serving in the military occasionally extern for the Judge Advocate General's Corps (more popularly known as the JAG Corps) of their mili-

externship interview directly with the agencies of their choice. Students are free to choose among the externships offered to them by any one of these agencies.

Students interested in prosecution can interview with three agencies: the San Diego City Attorney's Office, which prosecutes misdemeanors committed within the city limits; the San Diego County District Attorney's Office, which prosecutes felonies committed in the county and misdemeanors committed outside the city limits; and the Office of the United States Attorney for the Southern District of California, which prosecutes federal crimes. These prosecution agencies have office units specializing in a particular type of crime. For example, students externing at the City Attorney's Office may be placed in the domestic violence unit, students externing at the District Attorney's Office may be placed in units specializing in family protection, gangs, narcotics, fraud or juvenile delinquency, and students externing at the U.S. Attorney's Office may be placed in units specializing in fraud, narcotics and general crime, including border crime.

Students interested in criminal defense can interview with three agencies: the Office of the Public Defender, which provides representation to financially qualifying criminal defendants accused of committing crime anywhere in San Diego County; the Office of the Alternate Public Defender, which provides representation to financially qualifying criminal defendants when the Office of the Public Defender has a conflict of interest; and the office of Federal Defenders of San Diego, Inc., which provides representation to financially qualifying criminal defendants accused of committing federal crimes.[11]

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tary branch.

[11] Through the spring of 1995, students interested in criminal defense enjoyed a fourth option: an in-house criminal defense clinic. The clinic originally provided representation to adults accused of crime, but in 1985 the clinic began to specialize in juvenile delinquency. This clinic was a wonderful learning experience for students who functioned like lawyers with their own case load, representing juveniles accused of crime from the initial interview through any motions, trial (known as adjudication hearings), and sentencing (known as disposition hearings). Several factors led to its demise: (1) Declining student interest: Students facing a tight job market apparently preferred to extern with potential future employers; (2) Institutional resources: The clinic was limited to six students and team-taught

These agencies are not divided into as many subunits as the prosecution agencies. Students externing at the Office of the Public Defender and the Office of the Alternate Public Defender may be placed in subunits specializing in juvenile delinquency. Although the Office of the Public Defender is divided into lawyers assigned to misdemeanors and lawyers assigned to felonies, students externing at this agency are typically assigned to both a team of misdemeanor lawyers and a felony mentor.

In Criminal Clinic I, students are expected to work for their externship site a minimum of fourteen hours per week for fourteen weeks, or a total of 196 hours. Students often work many more hours, because they are enthused by what is often their first "real world" legal experience. Others will often work many more than the required hours because they want to impress their externship supervisors either to get a good letter of recommendation or a job offer after graduation.

USD's understanding with the approved agencies is that student externs will be exposed to a variety of lawyering skills, not simply as an observer but as a student-lawyer, with students conducting witness interviews, counseling clients, investigating facts, researching legal issues, drafting legal documents (like points and authorities in support of or in opposition to motions), doing other writing (like client letters),

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by two full-time faculty members, raising issues of cost-effectiveness; (3) Declining faculty interest: Even with only three students per instructor, supervision of the in-house clinic was enormously time-consuming. Given the demands of tenure and various pay incentives (including merit pay increases and summer research grants), instructors became more interested in producing scholarship than cooling their heels in courtroom hallways; (4) Legal changes: California's Three Strikes Law came into effect in 1994, and it was unclear whether and when true findings in juvenile court (the equivalent of adult criminal convictions) would count as priorable strikes. The potential consequences for clients meant increased emotional and professional burdens for students and instructors. The first two factors have been identified previously as factors favoring externships over live-client, in-house clinics. *See, e.g.*, Fell, *supra* note 6, at 286-87 (describing the Criminal Clinic at Thomas M. Cooley Law School). The third factor has been identified as an occupational hazard of sorts. *See* Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek To Narrow*, 8 CLINICAL L. REV. 109, 165 n.247 (2001) (attributing a diminution in clinical equal justice work to the assimilation into the legal academy of clinical instructors).

engaging in negotiations and making court appearances.[12] Most students spend the bulk of their time researching legal issues and writing motions (or in the prosecution agencies, responding to defense motions), and they will often argue these motions in court and handle any evidentiary hearings connected to the motions. Students receive their work assignments from one or more externship supervisors. Externship supervisors are lawyer-mentors on staff at the externship site.

At the end of the semester, students complete a writing assignment that requires them to reflect upon their externship experience.[13] Externship supervisors complete a form evaluating the student's externship performance and are invited to attach letters further detailing the student extern's performance.[14] Externship supervisors are also encouraged to give students feedback on their performance throughout the semester as they complete projects, like writing assignments, and make court appearances.

Student externs meet individually with the course instructor at least three times over the course of the semester. The point of these meetings is to make sure that students are getting a good educational experience. How are they spending their time at the externship? Do they have enough work? Do they have too much work? Are they doing appropriate work? How is the work environment? Are their supervisors available to them for guidance and feedback? Are supervisors abusive in any way or otherwise acting in inappropriate ways? When a problem is detected, the course instructor may take action by contacting the student's externship supervisor, but usually the course instructor brainstorms with the student about what actions the student can take to improve the situation. For

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[12] The State Bar of California certifies students to make court appearances under the supervision of a licensed attorney. Pursuant to Rule 983.2 of the California Rules of Court, law students are eligible for State Bar certification if they have successfully completed one full year of studies at an accredited law school and have completed or are currently enrolled in courses on Civil Procedure and Evidence. CAL. CT. R. 983.2. Pursuant to the local rules of the federal court, students are not allowed to make court appearances. S.D. CAL. CT. R. 83.3.

[13] *See* App. A (final writing assignment guidelines).

[14] *See* App. B (evaluation form completed by externship supervisors).

example, a student extern may have trouble connecting with an overextended supervisor. The course instructor might suggest that the student set up a regular meeting time with the supervisor (say, Mondays at 4 p.m.). To her disappointment, a student may find herself only researching and writing motions (or oppositions to motions). The course instructor might suggest that the student ask to argue any motions that she writes or suggest that the student meet with her externship supervisor to ask for other assignments. On a rare occasion, the agency may contact the course instructor with concerns about an extern's performance. These concerns are usually about attendance, inappropriate attire or other unprofessionalism. When the agency raises such concerns, the course instructor will meet privately with the student extern to discuss the matter.

B. The Class Component[15]

The class component of Criminal Clinic is an indispensable part of the course,[16] using simulation exercises to intro-

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[15] Some legal scholars take issue with the word "component" in this context. *See, e.g.*, Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 CLINICAL L. REV. 659, 660 n.2 (2004). They argue that the word carries a negative connotation and describes a class that is partial or diminished in value as compared to other classes. *Id.* I use the term here quite literally. Criminal Clinic I at USD consists of at least two components or two parts. That said, Criminal Clinic's class component could easily be offered as a stand-alone class, and other legal educators use the course textbook to teach a stand-alone simulation class (i.e., students are not required to work simultaneously in externships). In fact, over the years, Criminal Clinic I students have suggested offering the class component as a prerequisite for an externships-only clinic (students would not be required to attend class simultaneously but could apply what they learn from the class-as-prerequisite throughout their externships). The suggestion is motivated by the fact that some externs will encounter aspects of criminal litigation at their externships before those aspects are covered in class.

[16] In its Accreditation Standards, the American Bar Association (ABA) has expressed a preference for supplementing externships with classroom instruction. *See* Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?* 10 CLINICAL L. REV. 681, 683 (2004) (tracing the history of ABA regulation of externships). Nevertheless, the notion of requiring a classroom component has engendered a fair amount of criticism. *See, e.g.*, Eisinger, *supra* note 15, at 664-65, 669-70 (arguing, *inter alia*, that the more varied the placements the less compelling the classroom component); Seibel & Morton, *supra* note 6, at 439-40 (criticizing the ABA's "micro-management" approach to externships and

duce students to the various stages of criminal litigation. At USD, we use *Criminal Litigation in Action*,[17] published by NITA, as our textbook. The book tracks a realistic but fictitious criminal case (*People v. Battistone*) from arrest through sentencing (but not trial),[18] providing students with an overview of criminal litigation. The case unfolds in the fictitious State of Nita. The book includes a partial law library based on California law and practice but compares and contrasts procedures from different jurisdictions. For example, although most felony cases proceed by way of preliminary hearing in California, the book compares and contrasts grand jury proceedings with preliminary hearings. It further compares and contrasts different approaches to grand jury proceedings and preliminary hearings (for example, in most but not all jurisdictions, hearsay is admissible in grand jury proceedings).

In the various simulations, students are assigned to play the role of either the prosecutor or defense counsel at a particular stage in the *Battistone* litigation.[19] For example, when

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arguing that flexibility in the design of externship programs will best advance pedagogical goals). *See also* Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1 (1995) (concluding on the basis of an empirical study that, even when professional educators are uninvolved, law office work has significant educational value for law students).

[17] LAURA BEREND & JEAN MONTOYA, CRIMINAL LITIGATION IN ACTION (2002).

[18] The class component of Criminal Clinic spends little time, if any, on trial advocacy skills. Instead, the course emphasizes pretrial litigation and explores plea bargaining followed by sentencing.

This aspect of the class component is not unproblematic. Certainly, plea bargaining is the more common route to the resolution of criminal cases. *See In re* Alvernaz, 830 P.2d 747, 752 (Cal. 1992) (observing that "plea bargaining is an integral component of the criminal justice system"). Moreover, students taking Criminal Clinic have already completed a trial advocacy course (Lawyering Skills II), and students interested in honing their trial advocacy skills can take Advanced Trial Advocacy. Lawyering Skills II and Evidence are prerequisites. It occurs to me, however, that this aspect of the class component may be inadvertently sending the message to students that plea bargaining is the preferred method of resolving criminal cases.

[19] Some of the simulations do not involve a judge. For example, the simulations regarding charging, grand jury proceedings, discovery and plea bargaining either do not involve a judge or the judge's role is minimal. Other simulations involve a judge. For example, the simulated bail review hearings, preliminary hearings, motion hearings, and sentencing hearings require someone to play the role of the judge. Sometimes students are assigned to play the role of the judge.

we study pretrial release, students are asked to assume that the defendant is in custody, his bail is set at an amount certain and the matter is set for a bail review hearing. All the students are given the same police report, but each pair of opposition counsel are given a different rap sheet (detailing the defendant's criminal history) and bail report (detailing the defendant's family, work and community ties). Counsel address the court, arguing for or against the defendant's release on his promise to appear (also known as OR), or arguing that the bail amount should be raised, lowered or remain the same. Counsel are given the opportunity to respond to each other's arguments and are expected to address any questions or concerns raised by the court. Following the court's ruling, students and the course instructor debrief. During debriefing the course instructor will lead a discussion regarding the immediately preceding student performances and explore the choices made by the student advocate. Sometimes the course instructor will examine the substance of the argument by inquiring: What were your points? What unmentioned facts would have lent additional support to those points? What other points might you have raised? Did you consider calling witnesses, identifying people in the courtroom audience as the defendant's supporters or supplying the court with letters documenting family, work and community ties? Sometimes the course instructor will make observations about style or professionalism: The argument seemed overly defensive; try making an affirmative argument. Did you mean to attack opposition counsel's intelligence? Opposition counsel's integrity? What was gained? Lost?

A description of how the class component unfolds over the course of the semester may be useful to new and seasoned clinicians alike. A synopsis follows.

For many years, we began the class component of the course with a charging exercise. It seemed logical to start there. At least in the state courts of California, most criminal

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Sometimes the course instructor plays the role of the judge. Sometimes volunteer attorneys play the role of the judge. Students are particularly energized when volunteer attorneys play the role of the judge.

cases begin with the prosecution's filing of a criminal complaint. Of course, while lawyer involvement in a criminal case might begin with charging by the prosecutor, a criminal case arguably begins earlier, when law enforcement first becomes involved.

We now begin the class by discussing arrest, pretrial detention and the constitutional requirement of a prompt judicial determination of probable cause following a warrantless arrest.[20] Starting here allows us to highlight the distinct roles played by law enforcement officers, prosecutors and the courts in a typical case. Moreover, from the perspective of a criminal defendant, the central figure in a criminal case, the case begins here, with police investigation (or lack thereof)[21] and restrictions on his liberty.

We then turn to charging. We talk about fact management and ask students to organize the known evidence in *Battistone* according to the elements of various crimes.[22] Students also read and apply the Nita Uniform Crime Charging Standards. Should prosecutors file charges on the basis of probable cause or some other standard? When should prosecutors pursue additional investigation before charging? Under what circumstances should prosecutors dismiss charges?

We then turn to arraignment as an often *pro forma* hearing, and interviewing and counseling. Students are introduced to interviewing and counseling by conducting brief initial meetings with either the complaining witness (as prosecutor) or criminal defendant (as defense attorney). At these meetings, students encounter different classic personas, as played by other students. Prosecutors are introduced to the complaining witness who is reluctant to participate, perhaps recanting,

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[20] *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (holding that the Fourth Amendment generally requires judicial determinations of probable cause within forty-eight hours of warrantless arrests as a prerequisite to extended pretrial detention).

[21] *See* Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (documenting the pro-prosecution bias in police investigation).

[22] The topic of fact management is revisited in the classes on discovery, motions and trial preparation.

distracted, hostile or unfamiliar with the criminal justice system. Defense attorneys are introduced to the hostile defendant (he wants a "real lawyer," not a public defender), the inexperienced and frightened defendant, as well as an agitated, indignant or lying criminal defendant. Following these meetings, the class instructor debriefs the class, persona by persona. How did or should the student lawyer handle the hostile defendant or recanting complaining witness (aka victim)?

After arraignment and initial interviews, we study pretrial release. Roger Battistone is in custody. Under what circumstances, if any, should he remain incarcerated pending resolution of the charges? What information is relevant at a bail review hearing and why? What options are available to the judge? Should the prosecutor always try to increase the bail amount? Oppose an OR release? Should defense counsel always seek an OR release? As described above, students engage in simulated bail review hearings in their role as counsel.

Following pretrial release, we study preliminary hearings as probable cause hearings and contrast these hearings with grand jury proceedings. What are the defendant's rights at each of these hearings? From the perspective of the state or the criminal defendant, is one type of hearing to be preferred over the other?

Following our study of preliminary hearings and grand jury proceedings, students are introduced to formal discovery. Both the student prosecutors and the student defense attorneys receive discovery packets based on *Battistone* (including photographs, witness statements and real evidence) and have to decide what they will turn over to opposition counsel pursuant to a reciprocal discovery statute. Formal discovery (pursuant to statute) is compared with informal discovery and the prosecutor's obligations pursuant to *Brady*.[23]

Following the discovery exercise, students are introduced to motion work. The *Battistone* facts support several pretrial and in limine motions: a motion to suppress a confession as

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[23] *See* Brady v. Maryland, 373 U.S. 83 (1963) (explaining prosecutor's duty to disclose evidence favorable to the accused).

involuntary/pursuant to *Miranda*;[24] a motion to suppress evidence pursuant to the Fourth Amendment; a motion to suppress an in-court identification; a motion for a live line-up (defense); a motion for a handwriting exemplar (prosecution); a discovery motion; a motion to obtain personnel records of a law enforcement officer (known in California as a *Pitchess* motion);[25] and a motion to sever counts. Students are paired as opponents and argue the motions. Following the court's ruling, the class debriefs: When is the motion brought? What type of notice and format is required? What is the purpose of the motion? The grounds for the motion? Who has and what is the burden of proof? Are witnesses called? If so, who should be called to testify? What are the ethics of bringing or opposing the particular motion? What effect will winning or losing the motion have on the case?

Following the discovery and motion exercises, students are in possession of new information which they must assimilate. Students are expected to evaluate the case from their perspective and their opponent's perspective for purposes of trial in light of the applicable law and all the known evidence. Students methodically analyze the strengths and weaknesses of each charge and defense, as well as each witness's credibility, and articulate their theory of the case.

Following the case evaluation exercise, students engage in plea bargaining. Plea bargaining is presented as a complex matter,[26] requiring competent counsel to investigate the facts and law, assess the likelihood of conviction at trial, calculate the defendant's maximum exposure to imprisonment assuming conviction at trial, investigate the collateral consequences of a

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[24] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[25] *See* CAL. EVID. CODE §§ 1043-1047 (West 2002) (providing for discovery of certain police officer personnel records); Pitchess v. Superior Court, 522 P.2d 305 (Cal. 1974) (holding that a defendant charged with assaulting a police officer or resisting arrest and claiming self-defense is entitled to discovery of information and documents that may help him establish the propensity of those officers to act violently).

[26] For a discussion of defense counsel's responsibilities in preparing to negotiate a plea with prosecution counsel, see Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

conviction and identify the aggravating and mitigating factors for purposes of sentencing *before* negotiating. Students negotiate in pairs of opponents. Any pair of students unable to reach an agreement discusses the matter with the judge in chambers. Otherwise, the various plea bargains reached are discussed during a debriefing period. Here, students also consider whether and how hard defense counsel should "lean on a client" to plead,[27] as well as how much say crime victims should have about the resolution of "their" cases by negotiated plea.[28]

Following plea bargaining, the students study sentencing and, in particular, discretion in sentencing. Students are also paired as opponents and conduct sentencing hearings based on the *Battistone* incident but different pre-sentencing reports (detailing a particular plea agreement as well as criminal history and social background of the defendant).

II. THE VALUE IN COMBINING CRIMINAL EXTERNSHIPS WITH CLASS MEETINGS

The class component of USD's Criminal Clinic is important for several reasons. First, no two externships will be exactly alike. Students are placed with different agencies. Even when students are interning at the same agency, they may be assigned to different units of the office. Even when students are in the same unit at the same agency, they may have different externship supervisors with different approaches to their cases. Even when students are at the same agency and have the same supervisor, they will typically be working on different cases. The class component of the course ensures

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[27] For an excellent article on whether and how hard defense counsel should "lean on a client" to plead, see Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000). *See also* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998) (arguing that defense counsel should be required to advise the client whether or not to accept a plea offer and try to persuade the client to accept counsel's recommendation).

[28] *See* Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1 (1998) (advocating for more collaborative relationships between prosecutors and crime victims).

that students share basic knowledge about the criminal justice system, and this common knowledge facilitates dialogue on normative issues.

Second, in a one-semester course, students will not always follow a case from beginning to end (arraignment through sentencing or dismissal) at their externships. Most students will research various points of law and write memoranda or motion papers. Many, but not all, of these students will argue these motions in court.[29] Some of these students may also write a sentencing memorandum (known as a statement in mitigation or aggravation). Many, but not all, of these students will argue at the sentencing hearing. Many, but not all, externs will conduct a preliminary hearing. Only some students will conduct plea negotiations. Most students will see a case only after charges have been filed. Most students will not actively participate in the trial of a case, but they may organize discovery, prepare the trial notebook and sit at counsel table with their supervisor. No student extern will ever observe grand jury proceedings,[30] but some may be peripherally involved. The class component of the course gives students an overview of the process, filling in the gaps in their externship experience, and crystalizing for students how the various stages of litigation are sequenced and impact each other.

Third, students generally come to the clinic with little or no real world legal experience. Even when they have been exposed to criminal defense or prosecution work, only rarely have they previously appeared in court. They are understandably quite nervous and appreciate the opportunity to preview the courtroom experience in the less intimidating, classroom setting. The simulation exercises afford students the opportu-

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[29] Not all students will get to argue the motions they write. Students sometimes confront scheduling conflicts because motion hearings are set outside their externship hours, perhaps during class time. Some externship supervisors are not as comfortable as others in allowing students to conduct hearings, particularly evidentiary hearings, especially when the stakes are high.

[30] San Diego prosecutors at the state and federal level have not allowed students to observe or actively participate in grand jury proceedings. It is not clear to me whether this is because they interpret governing statutes to prohibit the presence of student externs or because office policy prohibits their presence.

nity to practice making oral arguments but also practice responding to an opponent's arguments and interacting with a judge.

Fourth, and perhaps most importantly, an "us-and-them" mentality and other prejudices seem endemic to practice and myopic lawyering can follow.[31] Of course, being adversarial-minded is not necessarily bad. Our legal tradition regards the adversary process as the best means of ascertaining truth.[32] Moreover, the image of the prosecutor as villain may motivate at least some public defenders.[33] Nevertheless, we want our

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[31] The vilification of opposition counsel is not uncommon. For example, a questionnaire study about bargaining tactics in the criminal justice system found, among other things, that "[d]istrict attorneys and public defenders exaggerated each other's stance on [ ] questionable tactics in the negative direction. That is, both sides thought the other would approve of [ ] questionable tactics to a greater extent than they actually did." Steven M. Garcia et al., *Morally Questionable Tactics: Negotiations Between District Attorneys and Public Defenders*, 27 PERSONALITY AND SOC. PSYCHOL. BULL. 731, 740 (2001). Apparently, it is not unusual for "groups at odds over an issue [ ] to exaggerate the stance of the other side." *Id.* at 741. Nevertheless, the study further found that the public defenders were more prone to exaggerate than the district attorneys. *Id.*

[32] As the United States Supreme Court has observed in an often-quoted passage: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975) (holding that denying defense counsel the opportunity to make a closing argument in a bench trial violated a criminal defendant's Sixth Amendment right to the assistance of counsel).

Nevertheless, some legal scholars, concerned about perceived adversarial excesses, have suggested that the English system of a unified criminal bar, a system in which the same lawyer may prosecute a criminal case one day and defend a criminal case another day, is to be preferred to our system. *See, e.g.*, WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1999); William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial*, 67 U. COLO. L. REV. 1027 (1996). *But see* Richard S. Frase, *The Search for the Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785 (2000) (reviewing Professor Pizzi's book). Others have advocated a unified bar, not to address adversarial excesses, but to make the adversarial system more fair by establishing parity between prosecutors and criminal defense attorneys. *See, e.g.*, Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997).

[33] For example, in a study of the Cook County Public Defender's Office, Professor McIntyre observed the following:

students to appreciate the opponent's perspective, not only to promote civility, respect and professionalism more generally, but also to enhance their competency as they better anticipate their opponent's motivations and actions.[34] To this end, we have experimented with role-switching, requiring students who are externing with a prosecution agency to play the role of defense counsel in the *Battistone* simulations and vice versa.[35] Even when we have not required role-switching, the de-

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> The sort of cheating to which public defenders attribute their hostility toward police, prosecutors, and judges is something that public defenders say they see a lot. And though such cheating may be expected, public defenders find it unacceptable–and are not afraid to say so. It is ironic, but listening to public defenders talk about their cases and why they do what they do is like listening to someone who has just been mugged. Public defenders do feel as if they are often mugged–by the legal system. There is a lot of real and passionate anger . . . .
>
> . . . Yet, the real frequency of misconduct is beside the point. The point is that most public defenders *believe* that such things do happen "all the time. It's something you really have to watch for" [ ].
>
> Whether or not public defenders are correct in their assumptions that police lie, that prosecutors will often do anything to win, and that judges do not really care or know enough to be fair, it is quite clear that the way in which the public defenders see the world not only excuses their work but makes it seem important.

LISA J. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 147-48 (1987). Professor McIntyre describes the public defender's world view as an "enabling mechanism[]." *Id.* at 148; *see also* Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004) (identifying respect for client, pride in craft and outrage at injustice as motivations for public defenders); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (identifying empathy and heroism as motivations to sustain public defenders).

[34] As a legal educator, I am a strong believer in requiring students to think methodically about a case through their opponent's eyes. Knowing my opponent's case better than my opponent had served me well as a lawyer. In this regard, I owe a debt of gratitude to UCLA Professors Bergman and Binder, whose writing instilled in me an appreciation of considering my opponent's case and gave me the tools to do so. *See, e.g.*, DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 58-76 (1984) (discussing evidence marshalling outlines).

[35] Students sometimes complain about role-switching. They sometimes argue that they are in a prosecution externship and need to practice being a prosecutor, not a defense attorney, and vice versa. Others have already cultivated a philosophical bent regarding crime and punishment and are virtually incapable of effective or even competent lawyering when they switch roles. Indeed, some have

briefing period following a simulation exercise and other opportunities for discussion afford students the opportunity to debate various topics.[36]

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full blown aversions to their opponent's work. Most students are more flexible. These students see the value of stepping into their opponent's shoes to see how the other side works. Some are still unsure about whether they want to do prosecution or defense work after graduation and appreciate the exposure to the other side as they try to determine where they will be most satisfied personally and professionally.

In this regard, I have tried to be an example. Although I practiced law as a public defender, I used a sabbatical leave to intern with the Family Protection Unit of the local District Attorney's Office. It was eye-opening. As a public defender, I had a lot of empathy for my clients and their families, but gave little thought to the victims of my mostly guilty clients. As a prosecutor, I found myself motivated by victim and public-safety concerns. As sentencing approached, my attention turned to questions like, "How likely is this defendant to reoffend?" "What will it take, in terms of punishment or rehabilitation efforts, to keep the defendant from reoffending?"

[36] Even Professor Eisinger, who is generally critical of combining externships with classroom instruction, recognizes the value of a classroom component under the circumstances of USD's Criminal Clinic:

> The value is particularly great when the class brings together students from opposite sides of the "v.," such as prosecutors and defenders. Often, these students become socialized early in the workplace to demonize their opponents or to see issues simplistically, which diminishes their abilities to represent clients effectively or to work cooperatively to improve the legal system. Dialog in class between externs from opposing sides can be useful to encourage both to look at issues more critically, from their opponent's vantage point or from a systemic perspective.

Eisinger, *supra* note 15, at 668.

An anecdote may be appropriate here. We take two field trips in Criminal Clinic I. Prior to conducting bail review hearings, students tour a county pretrial detention facility. Prior to conducting sentencing hearings, students tour the R. J. Donovan Correctional Facility, a state prison located in San Diego County. On the latter field trip, students observe inmates in the yard, inmates in different types of housing units (dorms, two-person cells, administrative segregation), inmates in various work-related activities and inmates in a rehabilitation program. Students actually sit and talk with inmates in the rehabilitation program. I have observed an interesting effect of the prison field trip on the ability of criminal clinic students, future prosecutors and defense counsel alike, to empathize with criminal defendants. When the field trip precedes the plea bargaining simulation, the defendant in *People v. Battistone* tends to receive more favorable plea bargains than when the field trip follows the simulation.

Another anecdote: Interestingly, by the time students write their final papers for the course, prosecution externs are still inclined to prosecute rather than defend, but they often recognize that criminal defense attorneys have an important, and even noble, role to play in the criminal justice system.

III. Conclusion

USD's Criminal Clinic mixes student prosecutors with student defense attorneys and combines externships with class meetings. Our formula aspires to achieve several pedagogical goals: to give students an overview of criminal litigation by studying its discrete stages in sequence; to promote critical thinking about the criminal justice system; to teach students about advocacy; and to develop students' competency, professionalism and creativity as future lawyers in the criminal justice system. If course evaluations are any indication, USD's Criminal Clinic is a winning formula. I suspect a synergetic effect. It would be a mistake, however, to read too much into the data. Consumer satisfaction is important, but the evaluations tell us only so much. For example, students evaluating the course are not making a comparative judgment, at least they are not comparing USD's Criminal Clinic with any other criminal clinic (for example, an externships- or prosecution-only clinic). It is, therefore, invaluable to participate in a symposium of the sort sponsored by the *Mississippi Law Journal*. The *Mississippi Law Journal*'s symposium on prosecution clinics provides a forum for learning from each other's experiences.

Appendix A

FINAL WRITING ASSIGNMENT

SUBMIT A TYPED, TEN (10) TO FIFTEEN (15) PAGE PAPER THAT ANSWERS THE QUESTIONS SET FORTH BELOW.

Writing Assignment Questions

1. What aspects of your legal education best prepared you for your placement? Did any deficiencies in your legal education surface while you were working at your placement? Would any additional subject matter or teaching methodologies have better prepared you for your placement?
2. Would you recommend other students to your placement? Why or why not? How can the placement be improved?
3. What was the tenor of the attorney/client or attorney/witness interactions that you observed? Condescending? Ambivalent? Positive? How so? Give examples. Did the character of these relationships affect the case or attorney in any way? If so, how so? Did you or would you handle these relationships differently? If so, how so and why?
4. What was the tenor of the attorney/opposition counsel interactions that you observed? Hostile? Ambivalent? Friendly? How so? Give examples. Did the character of these relationships affect the way that cases were handled? Affect the attorney? If so, how so? Did you or would you handle these relationships differently? If so, how so and why?
5. What was the tenor of the attorney/judge or attorney/courtroom personnel interactions that you observed? Respectful? Hostile? Friendly? How so? Give examples. Did the character of these relationships affect the case or attorney in any way? If so, how so? Did you or would you handle these relationships differently? If so, how so and why?
6. How did the lawyers at your placement interact with each other? Socially only (they "lawyered alone" meeting only for lunch, etc.)? Professionally only (training sessions, bouncing ideas around with each other, etc.)? Neither? Both? How did this aspect of workplace culture affect the lawyers personally and professionally? Did you or would you handle these relationships differently? If so, how so and why?
7. Describe your supervising attorney's emotional (versus profes-

sional) approach to cases? Detached? Zealous? Did the attorney's approach affect the way that cases were handled? Affect the attorney? If so, how so? Did you or would you approach your cases differently? If so, how so and why?

8. Race, gender and social class rightly or wrongly sometimes play a role in human relationships. Did race, gender or social class play any role for you or defendants, witnesses, attorneys or others interacting in the criminal justice system? If so, how so? Give examples.

9. What was the prevailing philosophy of practice at your placement? Did this philosophy affect the way that cases were handled or people, including you, the lawyers, defendants, and "victims" were treated? If so, how so? Would you be more comfortable with a different philosophy of practice? If so, which one and why?

10. How would you describe the quality of lawyering at your placement? What factors most affected that quality? The individual characteristics of lawyers? Caseload? What would you recommend to improve the quality of lawyering?

11. Describe any patterns of preparation that assisted you and/or the lawyers with whom you worked in anticipating and responding to courtroom events?

12. Describe the case evaluation process at your placement (How were cases evaluated, issues approached, strategy developed and goals set?).

13. Describe any ethical quandaries that arose for you or others at your placement. How were they resolved? Would you have resolved them differently? If so, how so and why?

14. Could you be personally and professionally satisfied working for your placement after graduation? Why or why not? Could you be personally and professionally satisfied working for the opposition (i.e., the defense if you were placed with a prosecution agency or the prosecution if you were placed with a defense agency)? Why or why not?

15. Compare your initial versus final impressions of criminal practice and the criminal justice system.

Appendix B

Evaluation Form
Criminal Clinic I
Fall 2004

Student: _____ Supervisor: _____

Placement Agency: _____

Please rate the student's performance in the following areas:

OUT OF COURT WORK:	POOR. . . . . OUTSTANDING				
Research Skills	1	2	3	4	5
Writing Skills	1	2	3	4	5
Creativity in Preparing Legal Documents	1	2	3	4	5
Comprehension of Legal Issues	1	2	3	4	5
Timeliness (Re: Deadlines)	1	2	3	4	5
Attitude Towards Job	1	2	3	4	5
Interpersonal Relations (with clients, witnesses, co-workers)	1	2	3	4	5
IN COURT WORK:					
Court Demeanor	1	2	3	4	5
Preparation	1	2	3	4	5
Advocacy Skills	1	2	3	4	5
Level of Confidence	1	2	3	4	5

Please feel free to add any comments on the student's performance.

_____

_____

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If you have any questions, please call Jean Montoya at 260-2327.

BEAUTY AND THE BEAST—HYBRID PROSECUTION EXTERNSHIPS IN A NON-URBAN SETTING

Margaret A. (Peggy) Tonon[*]

INTRODUCTION

As a clinician[1] working with external prosecution clinics over the past fifteen years,[2] I have become an unabashed proponent of hybrid prosecution clinics. In a non-urban setting, they are the best mechanism for delivering quality clinical experiences to students. The value of such clinics to the students, to the law school and to the surrounding legal community outweighs the deficits. This model works primarily because of the unique characteristics of a non-urban setting; the two components, non-urban and hybrid, work together to create the best learning atmosphere.

This paper examines and demonstrates how those two components, hybrid and a non-urban setting, work together to create quality external prosecution clinics. Part I describes the non-urban setting of the University of Montana School of Law. In addition to describing some of the physical characteristics, the section also explores the emotional and political character-

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[*] Clinical Supervisor and Director for Student Affairs at the University of Montana School of Law. I offer my sincere thanks to Professor Mary Helen McNeal who kindly read my first draft and gave me crucial suggestions; to Professor Larry Howell who, with a few quick comments, gave me tools with which to clarify my thoughts and my writing; to Professor Stacey Gordon whose editing hand was invaluable; to Geri Fox who helped me understand the quagmire of formatting and spacing and, finally, to Professor Hans Sinha who originally asked me to contribute an article and who, by asking, gave me the courage to give it a try.

[1] Throughout this article I use the terms "clinician" and "faculty supervisor" interchangeably.

[2] *See infra* note 25. In 1990, I was fortunate to become a part of the University of Montana School of Law Clinical Program through a three year Department of Education Grant.

istics of the non-urban setting. Part II explores the definition of a hybrid clinic as it is understood at the University of Montana School of Law and as it is described in the published scholarship. Part III examines the history of clinical education at the University of Montana School of Law and describes the evolution of the current prosecution externships. Part IV describes the strengths and weaknesses of the hybrid model and suggests ways to bolster the strengths and ameliorate the weaknesses.

PART I-THE NON-URBAN SETTING OF THE UNIVERSITY OF MONTANA SCHOOL OF LAW

There is little doubt Montana qualifies as a rural or non-urban state on any number of scales. While it is the fourth largest of the United States, it is also the forty-fourth smallest in population. It covers an area of 145,552 square miles and is nearly 1,200 miles from diagonal corner to corner.[3] It takes longer to drive from Missoula (home to the University of Montana School of Law), located in the Western part of the state, to Wolf Point, Montana, in the North Eastern corner of the state, than from Missoula to Seattle, Washington.[4] The United States Census estimates the 2004 population is 926,865.[5] There are 6.2 people per square mile.[6] Montana has a single representative in Congress.

The City and County of Missoula also qualify as non-urban in a variety of ways. In physical terms, the city has 57,053 residents while the county has 98,616.[7] The county has

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[3] See Montana QuickFacts, *at* http://ceic.commerce.state.mt.us/MTQuickFacts.htm for additional information on Montana's population.

[4] This travel fact is crucial in that it represents the nearest major league baseball stadium for Montana's clinician baseball fans. While Missoula has the benefit of the Rookie League Missoula Osprey, Safeco Field in Seattle is the closest venue for seeing the New York Yankees.

[5] *See supra* note 3.

[6] *Id.*

[7] See Montana QuickFacts, *at* http://quickfacts.census.gov/qfd/states/30/3050200.html for additional demographic information on the City of Missoula. See Montana QuickFacts, *at* http://quickfacts.census.gov/qfd/states/30/30063.htmal for additional demographic information on the County of Missoula.

an area of 2,600 square miles which is approximately twice the size of the state of Rhode Island.[8] While the population per square mile is 1,003 in Rhode Island, it is a mere 36.9 in Missoula County.[9]

While virtually all Missoulians would agree Missoula is non-urban in the context of the nation as a whole, the perceptions within the state are somewhat different. Despite its fairly small population, Missoula is one of Montana's four largest cities and is considered quite urban in relationship to other Montana cities and towns. For the purposes of this paper, I looked at Missoula through the eyes of clinicians located at other more metropolitan law schools and recognized Missoula's rural qualities were determined not only by numerical population, but by differences in demographics and life style as well.

A candidate running for Montana Attorney General once said, "Montana is like one big high school that no one ever graduates from."[10] The sense of personal connection within the legal community bears out that statement. Each of the three prosecution offices is staffed by supervising attorneys with whom I've previously worked as an attorney, with whom I am personally acquainted or who were my students. All of the judges in the different courts are men and women before whom I have practiced or with whom I have other professional relationships such as serving on boards or commissions. Lawyers practicing in Missoula and throughout Montana generally foster and maintain that close familiarity with and knowledge of each other.

The physical connectedness of the legal community plays a part in its non-urban make up as well. The three prosecution offices in Missoula, the County Attorney, City Attorney

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[8] See Rhode Island QuickFacts, *at* http://quickfacts.census.gov/qfd/states/44000.html for additional demographic facts for the state of Rhode Island. It was selected as a comparison state strictly based on its square mileage and population.

[9] See *supra* note 8 for information on Rhode Island and *supra* note 3 for verification of information on population demographics for Montana.

[10] Joseph Mazurek, Campaign Debate for Montana Attorney General Election at the University of Montana School of Law (1992).

and United States Attorney, are within a five minute walk of each other. The three different courts—Missoula County Courthouse, Missoula City Hall and Russell E. Smith Federal Building—are also literally within a five minute walk of each other.

The University of Montana School of Law plays a key part in this connectedness by virtue of being the only law school in the state. The closest neighboring law school, Gonzaga University School of Law, located in Spokane, Washington, is about a three hour drive over two mountain passes away. The University of Montana's other neighbor, the University of Idaho, is located in Moscow, Idaho and is about a five hour drive away. Approximately 75% of the University of Montana's graduates remain in the state creating a symbiotic relationship between the law school, its graduates and the State Bar.[11]

How do some of the obvious physical and personal characteristics impact the way the non-urban legal and professional community relates to the clinical program? Missoula, being a city of less than 100,000 people,[12] has a limited number of clinical placement options. All three prosecution offices in Missoula are currently involved in the University of Montana Clinical Program. While there are other prosecution offices in neighboring counties approximately fifty miles away, they are not an option for placement given their distance and the structure of our clinical program. If any one of the Missoula prosecution offices decided to withdraw, it would have a dramatic impact on the program.

Another non-urban impact is the reality that the prosecutors within each of the three offices do not generally specialize. In contrast to prosecutors in some larger metropolitan areas, each prosecutor can prosecute anything from traffic offenses and goats-running-at-large to domestic abuse and homicides. Having a broader caseload from which to work can affect how the offices incorporate the students. It also broadens the learning opportunities for students in ways that might

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[11] *See* 2004 Employment Statistics, *at* http://www.umt.edu/law/CarSStats04.htm.

[12] *See supra* note 3.

not be available in larger, more specialized prosecution offices.

The close ties within the Montana legal community also impact the students' clinical experience. If a lawyer has had a great success, word travels fast. If a lawyer has been struggling or needs help, word travels faster. While that is probably not unlike lines of communication in any bar, the difference in Montana is that word also travels to students through their own connections in the legal community. Students quickly become part of the network and part of the office culture.

My own professional ties, especially within the criminal law community, also impact what I say and do. If I make a comment about a case or on the performance of an attorney, whether just in passing, as part of a case review or in the seminar, it is more than likely that the my words will travel back to the subject of the comment. That fact tempers my opinions and makes cooperative and collaborative work that much more important.

Being in a smaller, non-urban community also allows me, as the clinician, relatively easy access to each of the prosecution sites and the courts. They are either a twelve minute walk or a three minute bus ride from the law school. Such close proximity means that I can be at clinic sites and attend court hearings on a daily basis. Attending a non-jury trial in City Magistrate Court at 10:00 in the morning still allows me to be back to the law school for an 11:50 in the morning faculty meeting. That access benefits both me and the students who develop a level of comfort knowing that I will be there to provide consistent critique and moral support.

The access to the prosecution sites and the courts is a matter of physical time and distances, reputation and trust. The years I spent in practice in the area and the reputation I earned as a prosecutor operate to open those offices to me and therefore to my students.

PART II-THE MONTANA DEFINITION OF A HYBRID CLINIC

Through the use of shared supervision, the Montana hybrid model strives to create a cooperative setting where students have the benefit of the wisdom of both practitioners and

clinicians. Public entities have the benefit of additional assistance and the law school has the benefit of offering clinical work to a greater number of students. This hybrid definition does not stand alone, however. It is inextricably intertwined with the non-urban setting which surrounds it.

While the idea of hybrid clinics is not new, there is relatively little scholarship solely devoted to a description or analysis of hybrid clinics.[13] Margaret Martin Barry, Jon C. Dubin and Peter A. Joy quote the 1917 article of William V. Rowe[14] and state, "[t]he type of clinical legal education that Rowe promoted most closely resembles a modern externship or perhaps hybrid clinic, in which students are placed with an offsite legal aid office, prosecutor, or public defender, combined with general classroom work, with *'demonstrations' of current clinical problems,* as well as individual instruction and guidance in each case in hand."[15] They further describe in part a "hybrid in-house/externship program" as one in which students are supervised by "both a full-time clinician and lawyers from the outside office."[16] They cite as a benefit to this arrangement the "added advantage of immersing students in an actual law office while ensuring their access to a full-time educator who can help them reflect upon their day-to-day experiences and to extract the appropriate lessons."[17]

For Montana, the first ingredient of the hybrid model is

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[13] Somewhat surprisingly, there are relatively few articles that specifically refer to clinic structures as hybrid and describe them in depth. *See, e.g.,* Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV 815, 817 n.5 (2004) (describing the hybrid clinic as a "combination of the in-house and externship clinic models" and citing the early work of William V. Rowe). *See* Leah Wortham, *The Lawyering Process: My Thanks for the Book and the Movie*, 10 CLINICAL L. REV. 399, 445 (2003) (describing in-house and hybrid clinics as ones where the students act as "lead counsel with major client responsibility under supervision").

[14] William V. Rowe, *Legal Clinics and Better Trained Lawyers-A Necessity,* 11 Ill. L. Rev. 591, 591 (1917).

[15] Margaret Martin Barry et al., *Clinical Education for this Millennium, The Third Wave*, 7 CLINICAL L. REV. 1, 7 (2000) (internal quotations omitted). This article is an excellent discussion of the past, present and future of clinical education at the turn of the millennium.

[16] *Id.* at 28.

[17] *Id.* at 28-29.

the immersion of students in a working prosecution office. Not only is it key, it is one of the goals of the prosecution externship course. It is my firm belief that having students in the middle of often chaotic prosecution offices develops skills that an in-house prosecution clinic could not similarly recreate. While not necessarily a blessing, having students face equipment shortages, unexpected time deadlines caused by misplaced files and other kinds of triage hones their abilities to learn and to adapt.

Another key ingredient of the hybrid model is the frequent and knowledgeable direct involvement of a faculty supervisor. There is a difference between an externship where the clinician's knowledge of a student's work comes primarily from journals and a weekly seminar and an externship where the clinician's knowledge of the student's work comes from being a routine visitor to the clinic sites and to the courtrooms. The latter model allows the clinician to provide more direction and to be more available to answer student concerns as they arise. It makes the model closer to an in-house model, but with benefit of exposure to a full-time prosecution office.

The third, and in many ways, most important ingredient of the hybrid model is the shared supervision of students by both a faculty supervisor and a practitioner. While it may be the most important, it is also the most complex, requiring constant care and attention. Shared supervision draws on many of the aspects of the non-urban community. It requires frequent contact, personal knowledge of the attorneys involved and, most important, a significant level of trust.

Part III-The Evolution of Clinical Education at the University of Montana School of Law

The creation of hybrid clinics at the University of Montana is a reflection of the school's long commitment to clinical legal education, its focus on integrating theory and practice and its willingness to experiment with a variety of clinical models. Our clinical path began in 1966 with the creation of

the Montana Defender Project.[18] The Defender Project was initially funded as part of the Ford Foundation's National Defender Project.[19] Professor William F. "Duke" Crowley was hired by the School of Law in January, 1966 to manage the program which, in part, provided students the opportunity to assist inmates at the state prison. As a part of the grant obligation, students would assist the inmates by reviewing convictions made suspect after the decision in *Gideon v. Wainwright,* 372 U.S. 335 (1963). In addition to working on *Gideon*-related matters, students assisted tribal courts in developing criminal procedures to satisfy federal due process standards. They also represented inmates at sentence review hearings. While the work during the school year was done for clinical credit, the Ford grant also paid students over the summers to work with the federal court in Billings, Montana to assist appointed

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[18] For an interesting description of the Defender Project written near the time of its creation, see University of Montana Law School News Volume XIII, Number 2 (August, 1967) and Volume XIV, Number 3 (December, 1968).

[19] See information on the Ford Foundation grant at http://www.fordfound.org/publications/recent_articles/docs/lawgrantees.pdf. The early history notes "[i]n 1959, the Foundation funded the National Legal Aid and Defender Association (NLADA) to establish a National Council on Law Clinics." *Id.* It goes on further to say,

> [t]he Foundation increased its support to NLADA in 1962, providing its National Defender Project with $2.6 million in seed money to create offices for the defense of indigent clients. This grant presaged by a few months *Gideon v Wainwright*, a case in which the U.S. Supreme Court declared that criminal defendants are entitled to legal defense regardless of their ability to pay for counsel.

Id.

Once the Ford Foundation funding ended the law school sought alternative funding. From 1978 until 1996, the project was funded through annual contracts with the State of Montana Department of Institutions. In 1996, the decision in *Lewis v. Casey*, 518 U.S. 343 (1996) changed the scope of the legal representation required to be provided to prison inmates. Based on that decision, the Montana Department of Institutions issued a request for proposals that significantly reduced the amount and kinds of legal services for its inmate population. The Defender Project's annual proposal outlined the same level of service it had previously provided. Not unexpectedly, the grant was awarded to a single attorney who would provide assistance only in drafting an initial pleading and who was forbidden by the terms of the grant from representing inmates beyond that point. The Law School felt that the limited scope of representation was pedagogically insufficient and raised ethical concerns for the students.

defenders in felony cases.

Participation in the Defender Project was initially elective. Over the years it grew from two or three participating students to nearly a third of the fifty member class. By the mid-1970s, it provided nearly every Montana law student[20] a limited required clinical opportunity.[21] From that modest beginning the law school gradually expanded its clinical offerings. By 1970, the local Legal Services Office began taking student clinical interns and in 1976, the Missoula County Attorney's Office was added to the clinical roster. By 1987, Montana maintained a clinical program which had grown to two in-house clinics and seven external clinics.[22]

The genesis of Montana's foray into hybrid clinics began in 1990 after events which had a significant impact on the school's clinical education program. During November 1987, an outside evaluator visited the University of Montana. The evaluator raised some serious concerns with the operation of the external clinics.[23] With that impetus, the law school made some significant initial changes to its external clinic program that improved its supervision of those clinics.[24] In order to

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[20] In the mid-1990s an ad hoc Clinical Committee recommended that the exemption for law review students from required clinical hours be eliminated. It created significant student debate and concern. The decision was made based on the premise that participation on a law review was not an activity equivalent to participation in a clinical program. While both activities have benefits for students, the committee could see no valid rationale for excusing law review students from the clinical requirement.

[21] As a 1974 Montana graduate and one of two women in the class that year, I have a vivid recollection of sitting inches away from an inmate client within the gray stone walls of the former State Prison. For movie trivia buffs, the former Montana State Prison building was a site of the movie "Runaway Train" starring Jon Voigt and Eric Roberts. If any of the readers have seen the prison scenes from that movie they may more fully appreciate why my recollection is so vivid.

[22] In 1987, the Clinical Program included in house clinics, the Montana Defender Project and the Indian Law Clinic. It also included seven external clinics: ASUM Legal Services, Montana Legal Services, Natural Resources Clinic, Child Support Bureau, University of Montana Legal Counsel's Office, United States Department of Agriculture and the Missoula County Attorney's Office.

[23] Among the concerns raised were the lack of significant supervision either by field supervisors or by the faculty supervisor, the lack of educational goals and objectives and the lack of a classroom component.

[24] Much thanks should be given to Professor John McDonald who, as Clinical

continue that improvement, the law school applied for and was awarded a three year Department of Education (DOE) grant[25] the specific purpose of which was to provide more support for the three largest external clinics.[26] A significant component of the grant included the hiring of a clinical supervisor to provide that extra support.

In August of 1990, I applied for the position and was hired. Having been a deputy county attorney for the prior 16 years, I looked forward to working with the county prosecution clinic. Having read the ouside evaluator's report and the DOE grant narrative, I began to look for ways to bridge the gaps identified by those documents. The grant's project schedule included establishing contracts (the precursor to the Memorandum of Understanding discussed later) with each of the three clinics, commencing a supervision and training project and developing a pilot classroom component among other activities.

Montana successfully applied for a second three year DOE grant to maintain and to revise and expand upon some of the changes made with the assistance of the first grant. The grant provided for a second supervising attorney to perform many of the same educational functions, but for three of the school's smaller external clinics.[27]

Coordinator, was instrumental in implementing some of those initial supervision improvements. Professor McDonald increased site visits, organized formal meetings of supervising attorneys and improved evaluation techniques.

[25] Section 1124u, Pub. L. No. 89-329, 79 Stat. 1219; Pub. L. No. 99-498, 100 Stat. 1560; Pub. L. No. 102-325, 106 Stat. 776 established the law school clinical experience programs; authorized the Secretary to enter into grants or contracts with accredited law school to provide clinical experience in the practice of law to law students; set guidelines for the use of funds and limitations on the amount a law school may receive in any fiscal year; and defined the term "accredited law school".

[26] Page six of the narrative from the University of Montana's grant application set a lofty goal for the project: "[o]ur goal is to provide the students in the external clinics with the same level of supervision and educational experience as that provided to in-house clinical students." The three largest clinics at that time were the local Legal Services Office, ASUM (which was the legal office for the student of the University of Montana) and the local County Attorney's Office.

[27] The other external clinics in operation at that time were the University Legal Counsel's Office, the United States Department of Agriculture and the Na-

From the Defender Project beginnings to the current array of three in-house clinics and fifteen external placement sites, the program has grown in scope, personnel and opportunity. The driving factor for its growth has been the combination of a clinical requirement and the availability of a variety of public interest organizations. The mixture of student desire for particular experiences and organization requests for student involvement has allowed the program grow and to meet multiple needs.

The growth has not come without complications. One of the challenges of a non-urban external program is the likelihood that more organizations will want assistance than can be accommodated. In any given year the Clinical Director receives calls from outlying prosecution offices, other non-profit organizations and private attorney offices that want to become involved in the program. In a small legal community, it is common that the attorneys wanting clinical students are all known to the law school and may be strong proponents of the school. Finding an appropriate way to make choices and distinctions between offers is much more difficult in a smaller community.

Since 1990, additional clinics have been added in the environmental field, judicial arena and public service sector. Acknowledging a growing interest in prosecution by the students, two external prosecution sites were added in the 1990s. The Missoula City Attorney's Office was added in 1994 and the Missoula office of the United States Attorney was added in 1999.

The external prosecution clinics are a vital part of the clinical program. Prosecution clinics allow students the opportunity to obtain repeated trial experience, though the amount of experience depends on the particular office. Montana students take a required trial practice course, but for students who want the opportunity to broaden the litigation skills they have practiced in simulation, the hybrid prosecution clinics are a marvelous place to start. Trial work by itself can be

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tional Wildlife Federation.

incredibly exciting or overwhelming for students. When it is combined with the type of feedback available in a hybrid clinic, it becomes the most edifying.

PART IV-BEAUTY AND THE BEAST-THE HYBRID PROSECUTION EXTERNSHIP MODEL

Simply stated, discussing hybrid clinics using the "beauty and the beast" analogy is another way of discussing strengths and challenges. The more complex question, however, becomes for whom is the hybrid model beautiful and/or beastly. Is it the faculty supervisor? Is it the students, the supervising attorneys, the educational objectives? The fairy tale beast I learned about as a child evolved into a kinder, gentler creature. Are the beastly qualities of the hybrid model of that same nature? To answer those questions it will help to first have a snapshot of the structure of the current program.

The Mission Statement for the University of Montana School of Law Clinical Program states:

> The mission of the University of Montana School of Law's required clinical program is to provide faculty-supervised, experience-based learning for third-year students as they represent clients in clinics serving the public interest. The clinical program engages students in applying, enhancing, and integrating substantive and skills components of legal education, improves their ability to identify and resolve ethical and professionalism issues, and assesses student performance and the law school's competency-based curriculum.[28]

Using the mission statement as a guide, the three prosecution clinics (in which nine students are placed)[29] are part of

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[28] See www.umt.edu/law/clinics.htm for a further description of the Clinical Mission Statement and an overview of the Clinical Program.

[29] In the evolution of the clinical program, there were times when as many as eight students were placed at the County Attorney's Office clinical site. That was the number in that clinic at the time of the 1987 ABA Site Team Accreditation visit. After implementation of the changes brought by the DOE grant (in effect the initial creation of a hybrid clinic), it became clear that neither the faculty supervisor nor the supervising practitioners could feasibly supervise that number of students in a single clinic. Each year the number of students placed at that

a clinical program that provides every student with a clinical opportunity. Because it is a required program, the perception of fairness in the placement process is critical. The assignment process includes an anonymous preference sheet where students indicate their top six choices and reasons for those choices. Prior to making their choices the students attend a "Clinic Fair" where each clinic is represented by supervising attorneys seated at tables that students can visit. The Clinic faculty make the placements with an effort to place as many students in their highest preferences as possible. While we have toyed with the idea of a random lottery, we found that a lottery would leave more students with lower ranked choices. Often, the three students assigned to each of the three prosecution clinics have made the selection their first or second choice clinic.[30]

At the beginning of each semester the students are given a variety of tools that will aid their work in the clinics. They receive a Syllabus and a Statement of Expectations. Among the expectations are hour per credit obligations, seminar attendance and participation and reflective writings.[31] The syllabus sets out the class sessions and readings for the semester which include individual case review meetings at the clinic sites, group case reviews, guest speakers on a variety of topics and class sessions on topics integral to prosecution.[32] They also receive a copy of the Memorandum of Understanding between the School of Law and their particular clinic site. Additionally, they receive a copy of the Student Evaluation of Clinic form and the evaluation form that will be used for their assessment.

In Part II, I discussed the key elements of a hybrid clinic: immersion of students in a working prosecution office, frequent

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site was reduced until finally settling on three as a reasonable number for both the supervisors and the students involved.

[30] For the 2004-2005 academic year 67% of all the students were placed in their first choice clinics, 24% were placed in their second choice clinics and 7% were placed in their third choice clinics. For the nine students in the prosecution clinics, five (55%) were placed in their first choice, three (33%)in their second choice and one (11%) in her third choice.

[31] See Appendix 2 for a copy of the Fall 2004 Statement of Expectations.

[32] See Appendix 3 for a copy of the Fall 2004 Syllabus.

and knowledgeable direct involvement of a faculty supervisor and shared supervision of students by both a faculty supervisor and a practitioner. What are the strengths and weaknesses of the components of the program that effectuate the key elements?

Components of the Hybrid Model

1. The Ability to Participate in Case Selection

If there is one element that contributes most notably to the definition of a hybrid model of supervision it is the ability to participate in case selection. In two out of the three prosecution clinics case assignments are made solely by the supervising attorneys.[33] In one, the county attorney's office, I make the bulk of the assignments and maintain a master list of those assignments that is distributed to each supervising attorney. I maintain office hours at the county for a minimum of three hours per week.

In making the case assignments I am given access to ticket (mostly traffic) cases as they come to the county attorney from the two justice of the peace courts. I review them for educational content and variety. I also consult with the supervising attorneys when they have cases (non-traffic misdemeanors) they distribute to the students.

a. Strengths and Challenges

More than any other collaborative practice (evaluation, supervision, etc.) case selection allows a faculty supervisor to make both practical and educational decisions about the work that clinic students will perform. The practical aspects include consideration of caseload volume. Students who are devoting eight to ten hours per week (including classroom time) to clinic need a manageable number of cases.

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[33] While I am not involved in case selection in the City and United States Attorney clinics, I have a sufficiently close working relationship with the supervising attorneys to have input if I feel the cases are not providing good educational opportunities.

The educational aspects include dimensions of case variety, student ability and student interest. In clinics where the primary intern work is misdemeanor traffic, a student may get limited educational value from his or her fifth driving with no proof of insurance prosecution. He or she may, however, get significant value from prosecuting the same offense that has other variables such as different officers, opposing counsel or judges. Students arrive at clinic with varied backgrounds. Some students have already had the opportunity to be a summer intern in a prosecution office; others have had no live courtroom experience at all. Students may express a particular interest in an area of prosecution such as domestic violence.

With the ability to make case selections comes the responsibility for overseeing the whole of a student's caseload. That load may increase in a variety of ways. Supervising attorneys retain the ultimate authority over all cases and therefore retain the ability to also assign cases. In a clinic with paid interns[34] working side-by-side clinic students, the clinic students may offer to take paid intern cases in order to assist their classmates. In either instance, the faculty supervisor needs to establish a system for keeping track of the true workload of the students.

The most successful way to accomplish that goal is to use technology to keep the lines of communication open. Asking everyone involved, from supervising attorneys to clinic students and paid interns, to use email and to keep the faculty supervisor advised can work well if everyone agrees and follows through. Challenges arise when that communication falters. Any of the involved parties may forget to advise the faculty supervisor of a case assignment or a reset trial date. Clinic students may feel real or imagined pressure to take assignments despite having a caseload that requires all of their clinic time. Interns may volunteer for additional assignments despite the

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[34] In two of the three prosecution clinics, students are employed as paid interns. They have the same variety of cases (primarily traffic offences) as the clinic students, but have higher caseloads. Clinic students get excused absences from law school classes for court appearances. Paid student interns do not. That fact creates some of the tension in caseload management.

effect on their overall caseload because they want a particular experience. The challenges arise when the discussions fail to take place.

b. Effect of Clinician Case Selection on the Clinician, Supervising Attorney and Interns

What are the benefits and tradeoffs created by the ability of the clinician to make case selections? The straightforward answer is that everyone benefits and everyone has to accept some tradeoffs in the process. For the clinician, the benefit gained is a greater sense of educational control over the work students are performing. The tradeoff is the acknowledgment that there will always be a fine line to walk between balancing the educational needs of the students and the institutional needs of the prosecutors to maintain the flow of cases through their office.

For the prosecutors the advantage is in some benefit to their time management. By not being primarily responsible for case assignments they are more able to manage their own workload. The tradeoff is in giving away the primary control over caseload assignments and numbers. Being part of a busy office they have the pressure of case flow management. By relinquishing the role of assigning cases, they walk the same fine line as the clinician between educational and institutional demands.

What about the students? How do they benefit? What tradeoffs do they make? The students benefit by having a caseload that is managed with an eye primarily focused on educational value.[35] Given the shared responsibility established by the Memorandum of Understanding,[36] however, the trade off for students may be in having too many masters and feeling caught between them. Students may feel uncertain as to who

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[35] This is not to suggest that prosecution clinics where case selection is made by the supervising attorneys lacks that component. It reflects, however, the advantage a clinician has to focus primarily on educational value without the added pressure of office case flow management.

[36] See discussion of shared responsibility versus ultimate responsibility for cases as discussed *infra* note 43 and accompanying text

has ultimate authority over their case loads. For this trade off as well as the others, the solutions reside in a well crafted and executed Memorandum of Understanding.

2. The Memorandum of Understanding

To effectuate a hybrid clinic, the relationship between the clinical faculty supervisor and the onsite supervising attorneys, must be close. The closer the relationship, however, the more complex. As suggested by some of the tradeoffs discussed above, all the parties need a road map or guide which details the interplay between the faculty supervisor and the onsite supervising attorney. To address those details, each clinic signs a Memorandum of Understanding (MOU)[37] with the law school that sets out the educational objectives of the clinic and the responsibilities of both the clinic faculty supervisor and the supervising attorney. It is reviewed each year and signed by all involved attorneys.

At the University of Montana the idea of a MOU germinated in the first Department of Education grant. The schedule of the grant project included, "Establishment of contracts with each of the three clinics. These contracts will define the law school supervisor's role vis-a-vis each clinic, providing for a sharing of supervisory responsibilities by the law school supervisor and the on-site clinical supervisor."[38] One of the important rationales for establishing those contracts was based on observations made by the site evaluators during the 1987 ABA site visit. Based on the concerns raised, the 1990 D.O.E. grant included the following language.

> Regardless of how extensive a training program a law school may develop for its external clinic supervisors, the fact remains that these supervisors are not employees of the law school and often work in offices that are understaffed. As a

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[37] See Appendix 4 for a copy of the Memorandum of Understanding (MOU) with the County Attorney's Office. The document is sometimes titled Memorandum of Agreement.

[38] Application for Federal Assistance dated January 12, 1990, page fifteen of the Project Narrative.

> result, their work as clinical supervisors is not of primary import to them and they cannot and do not devote as much time to student supervision as might be wished to meet traditional educational standards.[39]

Fifteen years later, the observations made in the grant, although muted, are still true. Some of the prosecution offices are still understaffed and the workload of the supervising attorneys has increased with the passage of time. The attorneys are still not employees of the law school and their own work must come first. What has changed, however, as acknowledged in the MOU's, is the agreement that providing an educational experience for the clinical students is of primary importance. The beauty of the memorandum is the clarity that it gives both parties. The beast is in assuring that everyone is able to meet the duties and responsibilities as set out.

a. Strengths and Challenges

By carefully setting out the expectations of the parties in the MOU, a cooperative enterprise has a chance to build. For example, the first listed obligation of the supervising attorneys is to "[h]ave ultimate responsibility for all legal matters handled by law students working under his or her supervision."[40] That language was the result of across the desk discussions between the clinician and the supervising attorneys. It was included for a variety of mutually beneficial reasons, not the least of which was to protect the integrity of office decisions. It was also included to protect the faculty supervising attorney from being placed in the untenable position of having case responsibility without authority to make ultimate decisions.

The first listed obligation of the faculty supervisor is to "[m]ake case assignments and maintain a calendar of motion, hearing and trial dates for clinical student cases."[41] This obligation came about three years ago as part of the evolution of the hybrid model. At that time the county attorney clinic was

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[39] *Supra* at page eleven of the Project Narrative.
[40] *Infra* at Appendix 4.II.A.
[41] *Infra* Appendix 4.III.A(1).

on the verge of leaving the clinical program. The decision to remain came from a negotiated Memorandum of Understanding that incorporated the increased involvement of the clinician in matters such as case selection, pre-trial mooting, office hours and court supervision.

The beast still lurks, however, despite the best intentions for the division or sharing of duties as laid out in the MOU. As recognized in the MOU, neither the clinician nor the supervising attorneys may always be available to appear in court[42] with every student on every case.[43] When that occurs the responsibility, in a hybrid clinic, falls to all three parties (clinician, attorney and student) to keep each other apprised of the case status. A call or email from a student about a changed court date should trigger a follow up call between clinician and attorney to assure that the student will be supervised.

With that supervision comes the concomitant duty to provide the evaluation and assessment at the end of each semester. Where does the supervising attorney begin and the faculty supervisor end? While the MOU attempts to answer that question by setting out specific areas of responsibility, the reality of day-to-day scheduling often blurs those crisp delineations of responsibility.

Some of the duties overlap and when that happens, tensions may arise between attorneys and clinicians when their approaches to cases differ. For example, as a former full-time prosecutor, working in an office where there are different guidelines on how certain classes of cases should be handled has been problematic at times. The repair for such tensions

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[42] *See* Montana Supreme Court Rule No. 12982 (1991). The Montana Student Practice Rule allows students who have earned a minimum of fifty-five credits to appear in court unsupervised, but with permission of the client (in civil matters) and the supervising attorney. The rule does not allow unsupervised students to appear in criminal cases where the defendant has a right to court-appointed counsel.

[43] By acknowledging that reality the parties were able to work out a compromise where a student may appear in court without a supervising attorney or clinician if both the attorney and the clinician agree that the student and the particular matter are appropriate for an unsupervised court appearance. *Infra* Appendix 4.II.E(6).

must fall to the faculty supervisor. When a clinician offers an alternative solution to a case problem, but defers to the standard office practice, students see different resolutions to problems. Students are also exposed to the reality of office politics.

Having different attorneys offer alternative solutions can and should be a benefit to students. In actuality, it can become a problem when students become concerned about who they should be looking to for direction. Again, it is the faculty supervisor who should take the lead in stressing that the student must follow the direction of the supervising attorney. While students can benefit from differing advice, they should feel secure knowing to whom they should turn for the ultimate decision making.

b. Effect of the Memorandum of Understanding on the Clinician, Supervising Attorney and Interns

The effect of having a detailed Memorandum of Understanding can be positive for both the clinician and the supervising attorney for reasons of clarity and clear delineation of duties and expectations. It has another effect, however, that is difficult to articulate. By setting appropriately high standards and expectations, the MOU also creates a level of facade. The reality in the office and the courtroom cannot always measure up to the expectations set out in the agreement. At times, students do not receive the level of supervision that either the clinician or the supervising attorney would acknowledge is optimal.

Is that a reason for abandoning the standards or setting different standards? No, it is rather an opportunity to step back and acknowledge that the expectations may be, in part, aspirational. It is an opportunity for the clinician to work with the supervising attorneys in reassessing the value of the goals. For example, if a student is feeling frustrated by a lack of regular contact with either the clinician or the supervising attorney, can the MOU offer some advice? Is there a requirement or expectation that is not being met? Can it be met in another way?

What about the effect on the student interns? I would be

naive if I assumed that each student dutifully read the MOU when reviewing his or her Clinic handbook. One of the better uses of the MOU, therefore, is to make it the centerpiece of one of the first seminar classes. Discussing the MOU gives students a clearer sense of the educational goals of the clinic-especially in a required clinic setting. The manner in which the MOU governs how the supervising attorneys and the clinician relate to each other has a ricochet effect on the students. It can be a tool for the students to use when they have questions or concerns about that relationship and about the operation of the clinic.

3. The Seminar Class

The classroom seminar has evolved over the years from a generic lawyering course attended by all third year students to separate seminars for each of the clinic groupings. The three prosecution sites attend a weekly seminar that addresses a variety of issues. The fall syllabus is drafted with input regarding class sessions provided by prior students in their written evaluations of their clinic.

The fall syllabus reflects the premise that providing a broad based introduction to the world of prosecution is the best use of classroom hours in a hybrid clinic.[44] In the first semester the emphasis is on exposure to the realities of the local law enforcement community. Tours of the regional detention center and the state forensics lab and lectures by retired detectives on interrogation and interviewing serve to give students a sense of how their casework impacts the rest of the law enforcement community. Students are encouraged to go on "ride-a-longs" with local highway patrol officers. While only one student in fifteen years has ever taken advantage of the opportunity, students in the county attorney clinic can observe an autopsy at

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[44] It does not primarily have a fundamental skills focus in part because of the heavily required skills curriculum at the University of Montana School of Law. All students are required to take the following skills-related courses: pretrial advocacy I and II, legal research, legal analysis, legal writing, business transactions, civil procedure, evidence and trial practice.

the state forensics lab.

An early semester class is offered on prosecutorial discretion and the ABA rules on prosecutorial conduct. In the future the class may be offered as a panel discussion utilizing the supervising attorneys as panelists. The benefit of that approach would be twofold. It would make the concept of prosecutorial discretion more tangible and it would allow the students to see their supervising attorneys as both lawyers and teachers.

Also included in the syllabus are monthly individual case review sessions at their clinic sites attended by the clinician and the individual students. It is time spent reviewing cases that they have pending or have recently completed. It is a time for both the student and the clinician to ask questions and get a sense of the work that is being done. Is the case selection sufficiently varied? Does it have an appropriate educational content? It is also a time to determine if the student is getting what he or she needs from the faculty supervisor, from their clinic supervising attorney(s) or the overall clinic experience.

One of the reasons for having the sessions at the clinic sites is to facilitate reviewing the actual case files. At the beginning of the semester such a hands-on approach is a valuable educational experience for students. For example, the supervising attorneys are steeped in the familiar process of prosecuting misdemeanor matters and have a vast array of knowledge. What they can sometimes forget, however, is the very basic level of knowledge that most students have when they first come into a clinic. The learning curve is incredibly steep. Taking the time, on site, to review files with students is time well spent. Taking the time, on site, to review the details of a traffic ticket and what those details mean to the prosecution of a case, may seem elementary to a busy practicing attorney. It is eye-opening to a student who has never seen an actual ticket.

a. Strengths and Challenges

A hybrid clinic approach allows students to bring into the classroom issues that arise in their casework. It also allows students to discuss those issues with a faculty supervisor who is actively familiar with their casework. Having that knowledge

gives the clinician the latitude to create classes that will best mesh with the real needs of the students as she observes areas where they are struggling or where they have questions. Meeting with students at the beginning of each semester to discuss their learning agenda sets the tone for the semester.[45] It is a time for me to become acquainted with the students and to determine what needs they have that might be addressed throughout the semester.

While individual meetings and classroom discussions are confidential, students often feel a dual allegiance to the supervising attorneys at their clinics and to their faculty supervisor. They often feel sufficiently comfortable discussing frustrations with happenings at their clinic sites with the faculty supervisor. When the faculty supervisor is in a hybrid clinic with similar responsibilities as the supervising attorney, where do students go if they have frustrations with the faculty supervisor? One of the challenges of the system is to create an atmosphere where students are unafraid to express concern or frustration, no matter what the source.

b. Effect of the Seminar Class on Student Learning

Given the demands of day-to-day clinic obligations, students may see the requirement of clinic as forced public service rather than an educational opportunity. Some students may see the weekly seminar as precious time away from the "real" work they are doing at their clinic sites.[46] The challenge for

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[45] *See* J.P. OGILVY ET AL., LEARNING FROM PRACTICE 24 (1998). Students sometimes struggle when faced with the learning agenda at the beginning of the semester. Their goals are often too broad to be effective. By meeting to discuss the agenda, the faculty supervisor assists students in refining their goals.

[46] A factor compounding the feeling that the seminar is taking away time from the "real" work of the clinic is the credit distribution. Students are required to complete a total of four credits of clinic and have the option of taking up to eight credits. Most of the students take two credits each semester. Those credit hours (four hours per credit per week) include all of their work, both at their sites and for the classroom seminar. It can easily be argued that two credits for all the work expected of the students is simply too little. When choosing between time spent on casework and time spent on classroom materials, most of the students would rather opt for the former, no matter how interesting the classroom piece. That fact is one of the major reasons that the seminar is grounded in the

the faculty supervisor is to create a classroom seminar that strikes a balance. A seminar that blends guest speakers and panels from current law enforcement with particularized skill sessions and issues of prosecutorial ethics is one method of enhancing the goal of creating skilled, ethical and thoughtful prosecutors.

4. Reflective Writings

Reflective writings or journals[47] are communication tools often used by faculty supervising external clinics to give a window on the world of the clinic student. As suggested to students in *Learning from Practice,*

> Journals provide an excellent mechanism for a two-way communication with the faculty supervisor responsible for overseeing your externship. A journal is not a substitute for personal communication, but it can supplement in-person communication in meaningful ways.
>
> A journal entry gives you the opportunity to frame carefully a specific question to which you would like an answer from the faculty supervisor. A journal provides the faculty supervisor with information about your externship and can help the supervisor design helpful learning interventions to improve your experience.[48]

Over the years I have taken different approaches when discussing the reflective writing requirement with my students. In some years I have arbitrarily set a schedule for submission of the writings and have given them suggested topics. In other

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hands-on realities of prosecution work described above.

Those frustrations may also be caused, to some degree, by simple fatigue. In a recent informal survey, I found that anywhere from one-third to one-half of third year students are employed between ten and twenty hours per week. When they add at least ten hours per week of clinical responsibilities, they see little time for their other academic work, family or social needs. Whether or not accurate, they often see the required clinic as the primary source of their fatigue. The reason for that focus may be the simple fact that most students, by their third year, resent any required courses.

[47] For a critical discussion on the role of journals see J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996).

[48] OGILVY ET AL., *supra* note 45, at 102.

years I have given the group two or three options and let them vote on which they preferred. The variables might include the number of writings, the frequency of submission and the length. In the most recent years the students have been required to submit three, one to two page writings, which are submitted monthly during the semester.

a. Strengths and Challenges

Over the years the evaluations from students on the reflective writing aspect of the course have varied from damnable to sublime. In discussing the requirement with students I have told them that my interest is not so much in what they are doing as in how they think about what they are doing/seeing. They have focused on a variety of issues: concerns with treatment defendants receive from judges, perceived inadequacies of opposing counsel, their own lack of understanding about courtroom process and frustrations with the required element of clinic.

In posing questions to me as the confidential reader, they put faith in that promise of confidentiality. I respond in writing to each student, sometimes both answering and asking additional questions raised by the content. If a student raises a particularly interesting issue, I might ask permission to raise it at a class session. I find that students are eager to share experiences with their peers and seek others' opinions.

The question is whether this tool serves a sufficient pedagogical purpose when the clinic is hybrid in nature and the students are afforded contact with the clinician more similar to that of an in-house clinic. More than fifteen years ago the relevance of reflective writing in the in-house clinic context was discussed by clinicians Philip Schrag and Elliott Milstein in the following exchange.

> PHILIP SCHRAG:
> Not only reading, but reflective writing increasingly is resisted in clinics. In my clinic, we used to have students write a seven page semester paper in addition to their classroom exercises and what they were writing to further their cases. The assignment simply called on them to write in depth about

> some small decisional moment or interpersonal event in one of their cases. They could write about a decision to file one kind of motion instead of another, or about a five minute, or even a five second, portion of a client interview. The point was to look at something closely and reflectively for seven pages. This year, after mutinies in two successive semesters over this diversion from case handling, we have had to abandon this writing assignment.
> ELLIOTT MILSTEIN:
> And because they were required to do it only because you said so. There was no demonstration of its usefulness in any way in their lives. I do not know that that is an irrational decision on their part or one that is fair to be angry about. With all the competing demands, telling a student something is in their interest is not enough. Students are not going to take your word for it. We need to create devices that interest them.[49]

Other guidance on whether the writing serves a useful purpose can be drawn from the evaluations of students elicited at the end of each semester. Below are selected student responses given over the course of the last two and a half academic years to the question, "Evaluate the reflective writing component of the course. What are its strengths and/or weaknesses for you?":

- I was surprised at the value of stepping back for a moment and really analyzing my thoughts from a creative point of view. Although the last one snuck up on me-they were more valuable than I anticipated.
- I thought it was fine. I don't know how much it really helped me, but it certainly didn't hurt me.
- Personally, I recommend it be optional. It becomes one more thing to do.
- Reflective writing is helpful insofar as it requires individuals to cognitively apply how to be a better attorney.

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[49] Panel Discussion, *Clinical Legal Education: Reflections on the Past Fifteen Years, and Aspirations for the Future*, 36 CATH. U. L. REV 337, 357 (1987). The frustrations expressed so many years ago by Philip Schrag have been the current topic of discussions among the clinical faculty at Montana.

- The reflective writing component was difficult, but made me more observant.
- The reflective part of the course is great. I really liked having the reflective interviews[50] because I got immediate feedback. I definitely recommend making that option available to everyone. In the midst of a searching moment, it is vital to have a person to respond to the feelings and questions so we know we aren't the only one in the world who has pondered such a thing.
- You get out of it what you put into it.
- I do not like this component and feel it adds little to the experience. I would get rid of this.

Although student reaction to the writing requirement is varied at best, most of the reflections that I read tell me that the students, some under duress, are doing the clarifying and reflecting I am looking to find. In balance, perhaps the student reflections enhance the life of the clinician more than they clarify and improve the lives of the students. Is it appropriate to ask the question, "What benefit does the clinician receive from the reflections?" Or, is that hubris? Clinicians can learn many things from the writings: topics that need further discussion, problems in supervision, suggestions for better instruction. If the clinician gains nothing more than the delight from reading a well-crafted piece of writing, is that selfish? If the end product that students submit has shown thoughtfulness and reflection, is that a sufficient reason to mandate it? Perhaps selfishly, my answer is "yes."

Below are two examples drawn from the last three academic years (used with permission of the writers) that illustrate my belief that clinicians have as much or more to gain from the writings than do the students:

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[50] During the second semester I have offered students an opportunity to have "reflective interviews" with me rather than to submit a reflective writing. I admit that the pedagogy of this offer is questionable. If one of the important benefits of reflection is the clarification created by the writing process, how can I justify this oral alternative? On the other hand, students who have taken me up on this offer have uniformly preferred that type of verbal reflection and the sessions have been beneficial to both student and teacher.

Essentially, I believe it comes down to a question of what justice truly is and what we are seeking to do as prosecutors. We have discussed the concept of justice in class, and yet I do not think we have come to an adequate definition-or more realistically, an adequate definition may be unattainable. Webster's dictionary defines justice in terms of impartiality, equity, vindictive retribution, merited punishment, rights, fairness, uprightness, and even a "virtue." But justice seems to have another element related to social consequences; i.e. what are the consequences to society by establishing guilt in a certain scenario. In the end, I do not think I can yet define justice except to say that the prosecutor seems to face a dual edged sword in many cases and can only strive to seek the truth together with the fact finder, while avoiding over-reaching.(R.A.)

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Days before, I had written to my mentor and good friend, a professor of philosophy at another institution, with my reaction to the readings you assigned. I remarked to him that the prosecutor is free of the duty to a specific "client," and that initially that freedom appeared to be welcome. Yet the duties that do exist for the prosecutor, to the interests of justice and the community, can be conflicting duties. Society, and the micro-society in which I live, Missoula, demands an infrastructure that operates in an orderly fashion. Drivers on the city streets are obligated to do their part to avoid confusion and promote safety, and rules are promulgated in accordance with those obligations. Clearly, those rules, like any other laws, must be enforced. Enforcement requires penalties for those who disobey, and the courts establish that a punishable offence occurred. I asked my friend, "When do the interests of justice outweigh the interests of society?" Could society value order to such a high degree that the demands upon its citizens become unreasonable? I wondered if a zealous prosecutor with an ear tuned to the interests of a community might miss the truth that no offense had occurred. I wondered if my first trial had taken place not because each individual in society deserves a just outcome, but because I had determined that an orderly society must be preserved.

A traffic ticket hardly seems to warrant such high-minded contemplation, yet perhaps municipal court is exactly where

> this thinking must begin. The proper sense of prosecutorial discretion developed at this level in the judicial hierarchy will also be the sense required at a higher level, where a human life may depend on the choice of a prosecutor. No matter what path my legal career follows, the choices I must now make as a prosecutor are teaching me to balance the need for justice for individuals and justice for collective society. The right choice, it seems to me, need not preclude one at the other's expense.
>
> I did not expect to feel the weight of these sorts of decisions in my clinical training. Perhaps I expected someone else to make the choices I am now facing. I find these choices disturbing because I know that without developing my own personal balancing test, I will never be able to make the choices without regret. I also know that these decisions may require courage to face a community that does not always agree with the discretion I exercise. Knowing now what my values require of me will prepare me for those times. I may experience more sleepless nights as I worry about making the right choices; possibly the worst thing that could happen is that these decision will NOT cause sleepless nights. (K.M.)

b. Effect of Reflective Writings

The above two reflections best illustrate the effect of a hybrid clinic's closer student-faculty association. In each of the two writings the students were reflecting in response to a case or incident about which I, as the faculty supervisor, was very aware and involved. In each instance I had talked with the student about aspects of the case or incident prior to their writing about it. Would the students have been as thoughtful had my involvement not been as direct? Perhaps. Would the students have felt as comfortable expressing frailties and concerns? Perhaps not. The more involved contact created an avenue for more thoughtful and vulnerable reflections.

The second writer's thoughts made me delve deeply to respond in as thoughtful a way. They also highlighted the importance of the non-urban community in which he or she was prosecuting. By describing "the micro-society in which I live, Missoula," the student acknowledged how seemingly minor

decisions can have a significant impact within the "micro-society." The same can be said of the decisions made by a clinician within that same micro-society.

5. Observation, Feedback and Evaluation

For a hybrid clinic, the ability to participate in the observation and evaluation of student performances is nearly as critical as case selection. I attend as many of the student trials in all three clinics as possible with an emphasis on the county attorney clinic because of my increased role within that clinic. My role when I attend is primarily as an observer/critiquer, but can be more involved depending on the student and my knowledge of the case. Immediately after the trial, time permitting, I sit down with the student and debrief the case and the student's performance. If both the supervising attorney and I have attended the trial or hearing, we both sit and debrief the student. Using the NITA[51] methodology, I take detailed notes and then use specific examples of performance to play back to the student and suggest alternatives with an explanation.

Prior to any court appearance the student gives the judge a Judicial Evaluation Form to complete and return to me.[52] The form was created in the early 1990s as part of a Department of Education grant previously discussed. The form works as well as the relationship between the faculty supervisor and particular judges. Having the advantage of a rural court setting with closer contacts and relationships, most of the judges use the form and have even come to chide students who neglect to present them with one. Depending on the judge and on time pressures, the form may give students minimal or quite detailed feedback from the judge's perspective. At a minimum it gives the student a starting point from which to talk with the judge if the student chooses to do so.

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[51] The National Institute for Trial Advocacy or NITA offers courses for attorneys, law students and law teachers in the art of advocacy and supervision. I was fortunate to participate in a NITA Advocacy Teacher Training course and have spent two one-week sessions teaching at Emory School of Law using the NITA teaching methodology.

[52] See Appendix 5 for a copy of the Judicial Evaluation Form.

In most external clinics, the responsibility for mid-semester evaluations[53] as well as written final evaluations[54] falls to the supervising attorneys who observe most or all of the casework done by the students. In a hybrid clinic, there is a sharing of that responsibility. There may be times when the clinician has been the sole observer of a student's court appearance or has been the only attorney to discuss a case with the student. It may be that the clinician and the supervising attorney have different, although equally valid, perspectives on a student's performance.

a. Strengths and Challenges

Generally speaking, it can be frustrating for any student who receives conflicting, separate feedback on courtroom performances and evaluation of overall clinic work. In a hybrid clinic setting, the opportunity for conflicting feedback is compounded. A successful partnership requires that both clinician and supervising attorney trust and value each others opinions even in disagreement. If the feedback is truly contrary, then it becomes the role of the clinician to help the student see the distinctions and benefit from differences.

For a clinician wanting to observe trials in multiple courts, not matter how physically close together they are, it can be a logistical challenge. The arrangement that I have with the City Attorney addresses that problem by sharing of observation duties. At the beginning of a semester we both attend all court appearances and give our feedback immediately after. As the semester progresses and we see a student gaining in confidence and experience, we often take turns attending court hearings or trials. The arrangement allows both of us to continue to assist

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[53] See Appendix 6 for a copy of the mid-semester evaluation form.

[54] See Appendix 7 for a copy of the Final Evaluation form. The evaluation process is periodically reviewed for its effectiveness for the students as well as for its workability for the supervising attorneys. Between 2002 and 2004 the clinical faculty proposed changes to the evaluation forms, met with the supervising attorneys to vet those changes and finalized a form where the evaluators would make observations supplemented by specific examples rather than use a numbering system.

and evaluate students and gives both of us time to manage our schedules.[55]

b. Effects of Observation, Evaluation and Feedback

In a hybrid clinic there is a benefit to the faculty supervisor, the supervising attorney and the student when everyone is actively interacting. Repeatedly, students positively report in their evaluations of their clinical experience that the time spent on feedback after a court appearance was the most beneficial aspect of the clinical experience. The same is true when they evaluate individual case review sessions.

Students are hungry for individual assessment and critique in what they perceive is a safe setting. Each year the same scenario plays out. The first time that I appear in the back of a courtroom with my notebook in hand, the student looks back nervously and clearly telegraphs that she wishes I were not there. Some are bold enough to say that to me directly. After the trial and the critique session that follows, the student visibly relaxes and then welcomes future incursions into "their" courtroom. The overall effect of direct observation, evaluation and feedback, when done in an affirming way, enhances a student's learning.

CONCLUSION

I titled this article "Beauty and the Beast" in part as a personal observation. For the past fifteen years I have considered myself to be incredibly fortunate in my work. But, that is not to say that there have not been frustrations. The one constant, the ability to stay closely involved with the courts, law enforcement and the prosecuting attorneys, coupled with the introduction of students to the prosecution world, is both the beauty and the beast of my clinical career.

Have I answered any of the questions that have been raised? For example, are hybrid prosecution clinics a meaning-

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[55] There are times when I have students in two different courts at the same time and the arrangement with the City Attorney allows me to maximize my coverage of student trial appearances.

ful fit in a non-urban community? The answer is "yes" for several reasons. The closeness of the legal community lends itself to shared responsibility. Conversely, the closeness of the legal community discourages a system where the law school clinician and the onsite supervising attorneys lead completely separate lives. The small legal community fares better when the people interacting with the students are working together, even when they may disagree over process or supervision issues.

Familiarity is a significant factor in the non-urban setting of the prosecution clinics. The three prosecution offices are the only ones available to our students. We do not have the luxury of different courts (immigration, bankruptcy, worker's compensation, appellate) sufficiently close to place our students if the three existing clinics choose to withdraw from the clinical program. That reality means that extra effort and negotiation must be employed to make the partnership between the prosecution offices and the law school work to the student's advantage.

Are hybrid prosecution clinics a meaningful fit for the faculty clinician? Perhaps I can only speak as a majority of one, but having a place in the life of the clinic student that goes outside the classroom makes the work and the student interaction more meaningful. Having a regular presence in the office, making case assignments and monitoring caseloads, giving regular feedback and evaluation; all of those actions create an educational atmosphere within the workplace. The reflective writings assume more depth, even when students do not like writing them or feel they are not a valued exercise. The day-to-day contact with the students extends past the clinic. On numerous occasions the closer student relationship created through the clinics has carried over into career or other counseling situations. That contact in turn helps solidify the clinic relationship and the relationship between the law school clinical program and future supervising attorneys.

Are hybrid prosecution clinics a meaningful fit for the onsite supervising attorneys? Without doing a market survey, I can only look to the anecdotal evidence. When the county attorney clinic and the clinical program were having frustrations

with each others conflicting needs, a negotiated Memorandum of Understanding resolved most of the concerns. Everyone recognized that neither the county attorney clinic nor the Law School could give students a meaningful clinical experience without the help of the other. Both sides recognized a symbiotic need and benefit.

It may be occurring to some readers that what I am describing is the same kind of relationship that in-house clinicians have with their students. In part, I think that is what happens. The difference, however, is that the students become part of a working prosecution office with all of its strengths and frailties. What the students lose in case depth, they can gain in broader case variety and experience.[56] Having the opportunity to handle both a variety of misdemeanors and to assist on felony cases has a broad appeal for students. With that opportunity comes time pressure that is certainly one of the frailties of a busy working office. Finding that reasonable medium becomes one of the primary, and most difficult, jobs of the faculty clinician.

I admire the work that prosecutors do. A prosecutor who has not fallen prey to the overzealousness[57] that sometimes occurs, can do more good for society than twice as many dedicated defense attorneys. When a prosecutor exercises his or her power with restraint and compassion, everyone benefits. The ripple goes farther.

I hope that forms used in Montana's hybrid clinics that I have attached as appendices will be of use to some. I know that our program has benefitted over the years from the generosity of other clinicians. In the years that I have attended clinical gatherings I have often both asked and heard the question, "But, how do you do that exactly?" I hope that the forms will

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[56] A student in the County Attorney's Office recently assisted a supervising attorney in the prosecution of an Attempted Homicide case in the District Court. The student's experience cemented his desire to seek work as a prosecutor post graduation.

[57] Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System,* 1992 BYU L. REV. 669, 670 (describing "an overzealous and insatiable desire to rescue the world from criminals")

help answer that question. This article was never meant to probe the scholarly depths, but rather to offer a practical view of hybrid clinics from a clinician in a small town.

Creating a clinical opportunity for students allows them to work within the chaos of a busy prosecutor's office, and yet also have the safety net of a clinician who understands the frustrations both they and their supervising attorneys encounter, has advantages that outweigh the disadvantages. The process is ever undergoing change and revision.

Students will and do say that there are problems with the system. They may feel that they do not have enough time with the supervising attorneys. Even when they are told that the supervising attorney offices are open door and that they should feel free to walk in at any time, students believe what they see rather than what they hear. They see the attorneys carrying insurmountable caseloads and they often do not want to interrupt. Students do and will say that they are asked to do too much work for the credits allotted. Each group of students has different ideas about how to improve the clinic. The program changes as we all experience it.

But when the final analysis is in, the benefits of a cooperative effort that utilizes the advantages that a non-urban setting has to offer, outweigh any disadvantages. The final product is worth the effort and serves the common good.

Appendix 1

Clinic Descriptions
Academic Year 2004-2005

Criminal Defense Clinics

Criminal Defense Project, Prof. Jeffrey Renz (Maximum of eight students)

The Criminal Defense Clinic is located in Room 192 of the Law School. Students in the Criminal Defense Clinic represent defendants in serious misdemeanor cases (cases that require appointment of counsel) and occasionally represent clients in uncomplicated felonies. At the start of the semester, students who enroll in the Criminal Defense Clinic will, as part of the clinic's requirement, complete a short course in trial techniques. Students will observe and conduct simulated jury selection and direct and cross examination. Opening and closing arguments will be demonstrated. Students will be videotaped and will review their videotapes with an experienced litigator. Following completion of this training, students will participate in all phases of a criminal defense from the initial meeting with their client through acquittal or sentencing and, if necessary, appeal. The Criminal Defense Clinic also represents prisoners in habeas proceedings in the United States District Court and in post-conviction proceedings in the state courts, and may engage in other litigation related to the rights of defendants and prisoners.

Federal Defenders of Montana, John Rhodes, David Avery (Maximum of two students)

The Federal Defenders of Montana, which is located at Millennium Building, 125 Bank Street, maintains a branch office in Missoula. The mission of the Federal Defenders of Montana is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (Title 18 U.S.C. § 3006A), and other congressional mandates are enforced on behalf of those who cannot afford to retain counsel or

obtain criminal defense services. In fulfilling its mission, the Federal Defender program helps to (1) maintain public confidence in the nation's commitment to equal justice under law and (2) ensure the successful operation of the constitutionally-based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced.

Clinical students will assist the federal defenders in providing aggressive and effective legal representation to individuals accused of federal offenses, under investigation for federal criminal violations, or appealing a federal conviction or sentence, as well as furnishing representation to federal *habeas corpus* litigants (including those under a sentence of death). Clinical students will directly experience client contact, aid with defense investigations, participate in proceedings in the United States district court (to the extent permitted by the client, the court and the attorney supervisor), and research trial and appellate issues. Assignments may also include writing memoranda in support of pretrial motions and drafting briefs to the United States Court of Appeals for Ninth Circuit and writs and petitions to the United States Supreme Court.

Prerequisite: Students applying should attach a resume indicating prior experience working with people.

Indian Law Clinic, Tracy Labin, Acting Director (Maximum of eight students)

The Indian Law Clinic is an in-house clinic at the University of Montana School of Law. The students in this clinic can participate in a wide variety of activities, including: responding to requests for assistance with tribal code development; creating training programs for tribal entities; providing technical assistance to tribal courts and organizations; representing clients in tribal court; handling mediation/settlement conferences; assisting non-profit organizations on a variety of indigenous rights issues; and handling legal research requests from federal, state and tribal courts judges, as well as attorneys working in the field of Indian law. The primary objective of the Indian Law Clinic is to provide students with practical experience regarding the application of federal Indian and tribal law in

the various forums and how to effectively work with Indian clients.

Prerequisite: Students should take or have taken Federal Indian Law or Tribal Courts/Tribal Law. It is recommended this be done prior to taking clinical although it can be done concurrently with clinical.

Judicial Clinic, Federal District Court Judge Donald Molloy (one student) and United States Magistrate Leif Erickson (three students).

The United States District Court, Missoula Division, is located in downtown Missoula in the Russell E. Smith Courthouse, 201 East Broadway, and has a law library and work stations with computers. Interns work on active court cases and receive instruction and guidance from the Judge and court staff. Duties include legal research, oral presentation and discussion of work in progress, and drafting of advisory memoranda and court documents. Interns also observe a variety of pretrial conferences, settlement conferences, hearings, criminal proceedings and trials.

Prerequisite: Students applying should attach [to their clinic preference sheet] their resume and an anonymous writing sample of no more than five pages.

Land Use Clinic, Professor John Horwich

The Land Use Clinic is an in-house clinic located in the Law School (Room 185). The clinic is staffed by law students, graduate students in Environmental Studies, and students in Land Use Planning in the Geography Department. The Land Use Clinic provides services to local Western Montana cities, towns and counties. Services include assistance in long-range planning efforts and the development of growth management plans as required by Montana law, ordinance drafting and support to local communities addressing specific land use issues.

Students work with city, town and county attorneys and with local planning staffs and citizen boards. Students provide advice to local communities regarding their legal obligations

under Montana law. Students assist in the preparation of local growth management plans and zoning ordinances. Students also provide research and advice concerning specific land use issues.

Students will periodically travel to the communities for which they are working to meet with local officials and to attend relevant public hearings.

Special Land Use Clinic Requirements:

Credit Hours: Students in the Land Use Clinic *must* enroll for a minimum of *five credit hours* for the year.

Grading: The credit/no credit option for grading is *not* available for the Land Use Clinic.

Course Prerequisites: All Land Use Clinic students must have completed the Land Use Planning Law course.

Legal Service Clinics

ASUM Legal Services, Annie Hamilton, Tom Trigg, Terry Burnham (Maximum of ten students)

This office is located on campus in the UC, and provides a variety of legal services to students at the University. The cases encountered are 70% civil and 30% criminal. The civil cases are of a broad variety, including dissolutions (divorces), negligence, consumer, contract drafting, landlord/tenant, simple wills, and domestic cases (adoption, name-change, etc.). The criminal matters are generally limited to misdemeanors such as drug possession, DUI & other traffic citations, shoplifting, and disturbance & assault charges. Interns will meet one-on-one with clients and will be primarily responsible for their cases. Interns can expect to perform the full range of attorney activities, from negotiating, drafting, and plea-bargaining, to court appearances which may include hearings, non-jury trials and occasional jury trials.

Child Support Enforcement Division, Patrick Quinn (Maximum of one student)

The Child Support Enforcement Division is located at 1610 South 3rd West, #201. A clinical student assigned to the Child

Support Enforcement Division of the Department of Public Health and Human Services will be exposed to the various roles performed by an attorney for a state agency. This may include attending administrative hearings, attending and participating in contested district court matters, drafting proposed legislation, determining compliance with Federal and State statutes and regulations, preparing modifications of child support for approval by the District Court, interpretation of case law, and drafting of responses to petitions. This clinic is valuable experience to any student who wishes to work for an agency of the State of Montana.

Montana Legal Services Association, Klaus Sitte, Ed Higgins (Maximum of four students)

Montana Legal Services Association (MLSA) provides access to justice for low income clients in civil cases. Student interns will have an opportunity to represent domestic violence survivors in family law cases, social security clients (including administrative hearings), and work to resolve landlord tenant issues. MLSA has a holistic approach to its clients, and will attempt to meet all of their legal needs, which may include additional areas of practice such as public benefits, housing law, consumer law, and others. Interns will also have an opportunity to participate in a videoconferencing pilot project, representing and advising low income people in Miles City through use of this technology. Representation may include court appearances using this ground-breaking technology as a way to provide legal services to rural communities.

Interns are fully integrated members of the law firm. Cases will be assigned to the intern and each intern will be expected to handle a variety of cases as if she/he were an associate in a firm. Interns work under the supervision of a supervising attorney but are given significant responsibility for their cases. Interns can expect to appear before district court judges, standing masters, and administrative law judges. In addition to an opportunity to use litigation skills in a contested hearing, interns will gain practical general practice skills such as client interviewing techniques, negotiation skills, document drafting

and legal research.

MLSA clients have nowhere else to turn for legal assistance, and are highly appreciative of the work done on their behalf by student interns. Students will leave their clinical experience knowing that they have made a real difference in someone's life.

Montana Legal Services office is located in downtown Missoula, at 304 North Higgins Avenue.

Mediation Clinic, Art Lusse, Torian Donohoe (Maximum of three students)

This clinic has two components. First, clinical students have the opportunity to mediate legal and non-legal cases. *Mediations include cases referred from the justice court (including small claims and general civil cases with attorneys), sheriff's office, police department, and the city and county.* Mediation is also available at the Salish-Kootenai College twice a month. Students are expected to engage in extensive preparation for each case along with their co-mediator, review files, review the law (where applicable), and discuss the case with their clinical supervisor. Following each mediation, students are expected to keep journals and meet with the supervisor to discuss the mediation.

The second component of the Mediation Clinic involves consulting and training with the University of Montana student Peer Mediation Program and training opportunities in the middle and high schools in School District 1. Students consult with new student mediators, are involved in the teaching of conflict resolution and mediation skills and theory, and coach role-plays.

Prerequisite: ADR 614.

Prosecution Clinics

Missoula City Attorney's Office, Judy Wang, Jim Nugent (Maximum of three students)

The Missoula City Attorney's office is located on the second floor of Missoula City Hall, 435 Ryman. Students who are as-

signed to this clinical will spend a lot of time in court. The general areas of legal assistance that will be available to a law school clinical student include legal research of civil, administrative or criminal matters; counseling citizens regarding municipal government operations; interviewing complainants and witnesses in misdemeanor criminal cases; and preparation and prosecution of misdemeanor cases in Missoula Municipal court. Clinic Students work on real cases with real people.

Missoula County Attorney's Office, Kirsten LaCroix, Dale Mrkich, Suzy Boylan-Moore (Maximum of three students)

The Missoula County Attorney's office is located at the county courthouse. Clinical students assigned to the Missoula County Attorney's Office deal with a variety of criminal and civil matters. The students represent the State of Montana as the prosecutors in traffic and other misdemeanor cases in the justice courts or on appeal of these cases in district court. In these cases, the students make use of the lawyering skills of interviewing and preparing witnesses, building a case file, negotiating case resolutions with other lawyers, law students or pro se defendants, legal writing when responding to motions, and the litigation skills needed in jury and non-jury trials. Students also have the opportunity to assist members of the County Attorney's staff in felony cases in the district court by preparing written briefs on motions, handling pre-trial hearings, or sitting second chair at trial. Students also often represent the State in driver's license suspension cases in district court. In addition to the litigation experience, students handle the bulk of the questions from the public which are addressed to the County Attorney's Office in the areas of landlord-tenant and consumer relations.

Although the focus of the clinic is primarily in the area of criminal law, students may have the opportunity to work under the supervision of several attorneys in the office in the areas of public health, mental commitments, juvenile justice, child welfare, or land-use planning. Students must spend time in the County Attorney's Office above-and beyond their litigation time handling questions from the public. Students will be expected

to work the entire school year, with a minimum of two credits per semester. Students will also be expected to attend two full days of training prior to the start of the fall semester before beginning work at the clinic.

United States Department Of Justice, Kris McLean, Josh VandeWetering and Robert Anderson (Maximum of four students)

Students placed with United States Department of Justice may work with both the United States Attorney's Office and the Wildlife and Marine Resources Section, Environment and Natural Resources Division.

The United States Attorney for the District of Montana has established an office in Missoula. The Assistant United States Attorneys in the Missoula office, Kris McLean and Josh Van de Wetering, have primary responsibility for all criminal and civil cases which involve the United States in the Missoula Division of the United States District Court for the District of Montana. Although law students selected for this clinic will not have access to grand jury or other sensitive information, they will be involved in all aspects of the office's caseload. Assignments for the criminal work in the office may include appearances (initial appearances and detention hearings) and trials involving misdemeanor offenses before United States Magistrate Judge Leif B. Erickson, research and pretrial briefing for criminal cases, and research and brief writing for appeals before the Ninth Circuit.

The Wildlife and Marine Resources Section, Environment and Natural Resources Division, United States Department of Justice has office space within the United States Attorney's Office. The primary responsibility of the office is to prosecute federal criminal cases involving violations of wildlife laws like the Endangered Species Act, Lacey Act, Migratory Bird Treaty Act, Marine Mammal Protection Act and others. Many cases arise from long-term undercover investigations of criminal syndicates engaged in organized illegal international trafficking in protected wildlife species. Students working with Robert Anderson will primarily assist him with research and writing.

Note: Students will be required to obtain a federal security clearance through the submission of an application which must be completed prior to the end of the spring semester.

Natural Resource Law Clinics, Tom France, Matt Clifford (Maximum of three students)

Students placed with the Natural Resource Law Clinics may work with either the National Wildlife Federation (NWF) Northern Rockies Natural Resource Center or the Clark Fork Coalition.

The National Wildlife Federation's Northern Rockies Natural Resource Center is involved in cutting edge litigation and policy formation at the state, regional and national levels. Students will be supervised by Tom France of the National Wildlife Federation in Missoula, but will also have the opportunity to work with other lawyers active in natural resource litigation. Students will be involved with issues including forest planning, grazing, coal bed methane development, hard rock mining, oil and gas leasing, and endangered species management. NWF has a particular focus on wildlife conservation and restoration including wolves, prairie dogs, and grizzly bears. NWF's wolf work currently includes initiatives in the southern Rockies and the northeast. In working on these projects, students will have an opportunity to work with NWF biologists, other NGO's, and government officials. Work assignments include brief writing, administrative appeals, NEPA comments, and legal and factual (scientific and otherwise) research.

The Clark Fork Coalition offers a mix of experience in litigation and environmental policy/advocacy. Students will be supervised by Matt Clifford. The Coalition's mission is to protect and enhance water quality and environmental health in the Clark Fork River basin. Typical clinical assignments include research and writing related to ongoing litigation under laws such as the state water quality act, the metal mine permitting laws, and local land use law. Students also can expect to help prepare substantive comments on environmental impact statements and other government proposals, and to assist with representing the Coalition before state and federal administra-

tive agencies.

Office of General Counsel, United States Dept. of Agriculture, Mark Lodine, Alan Campbell, Jody Miller (Maximum of three students)

The Office of General Counsel is located in the Federal Building, 340 North Pattee. Clinical students assigned to the USDA perform in a variety of civil and in a limited number of criminal matters. The Office of General Counsel represents Region 1 of the United States Forest Service encompassing Northern Idaho, Montana, North Dakota and parts of South Dakota, with responsibilities encompassing federal contract appeals, forest planning, mining claim review and contests, claims and objections under Montana and Idaho water law, Federal tort claims, land acquisition and special uses, and law enforcement. This office also represents the Montana Offices of Rural Development, Farm Service Agency, Commodity Credit Corp., Natural Resource Conservation Service, Agricultural Research Service, Food & Nutrition Service (Food Stamps), and other USDA agencies with responsibilities including loan servicing, foreclosure actions, bankruptcy proceedings, tort claims, water right claims and objections, criminal prosecutions of food stamp violations, and general advisory opinions.

Rocky Mountain Elk Foundation (RMEF), Grant Parker & Sally Johnson (Maximum of four students)

The Elk Foundation Law Clinic provides students with the opportunity to apply the skills they develop in the class to the real-life situations met daily by this Missoula-based international conservation organization. There are opportunities to participate in many aspects of non-profit corporate law, which includes areas such as: employment law, real estate law, conservation easement issues, charitable contributions, planned giving and tax issues, individual state gaming compliance and tax issues, trademark law, copyright law, water law, and various types of contracts (sales, personal service, consultants, Internet, etc.). Interns are asked to provide the organization with accurate assistance in the following areas: document prep-

aration, legal and factual research, correspondence and pleadings, legal analysis and problem resolution, work product deadline control methods, and timely completion of assignments. The RMEF Law Clinic will enable students to apply these skills while working with in-house counsel, in a supportive, non-confrontational setting.

The Rocky Mountain Elk Foundation is a non-profit, conservation organization whose mission is to converse and protect habitat for elk and other wildlife. RMEF has a membership of over 124,000 through more than 450 chapters in the United States and Canada. The Elk Foundation has generated $70 million for habitat conservation, and have conserved and enhanced nearly three million acres, including over 730,000 acres of land acquisitions and nearly 60,000 acres of conservation easements, and completed more than 2,800 conservation projects in forty-seven states and eight provinces.

University of Montana Legal Counsel's Office, David Aronofsky (Maximum of four students)

The University of Montana Legal Counsel is located in Main Hall at the University of Montana. Students assigned to the University Legal Counsel's Office potentially handle a wide variety of legal matters. Activities will include assistance with the following: intellectual property issues; legal representation of the University in litigation and administrative agency proceedings; legislative drafting; development of University policies; and extensive client counseling with University administrators and committees. These matters also include extensive employee relations and personnel activities. This office serves as in-house General Counsel for the five University of Montana campuses with responsibility for coordinating and providing legal services throughout the University. Clinical students work under the supervision of University Legal Counsel David Aronofsky.

Appendix 2

Statement of Expectations for Prosecution Clinics
Fall Semester, 2004

The following is a statement of expectations for students in the Missoula County, Missoula City and United States Attorney Offices for the fall semester. The purpose of the statement is to clarify what each student must do to satisfactorily complete the course in the fall semester.

1. Complete all obligations to your clients as defined by your supervising attorney(s).

2. Complete the Learning Agenda and Self-Assessment discussed during Orientation. Schedule a time to discuss those documents with your supervising attorney. Return them to Professor Tonon by the first individual case review session.

3. Prepare for and attend* all scheduled clinical seminars, training sessions and case reviews (see Syllabus for dates) unless they conflict with court dates or have been previously excused.

- The following opportunities for clinical credit are strongly encouraged, but not required.

November 8, 2004 - The Judge James R. Browning Distinguished Lecture in Law - Professor Charles Ogletree of the Harvard Law School Clinical Program (time and location to be announced)

4. Complete the reflective writing requirement as discussed during the first seminar session. It is expected that you will give some thought to what you write and seriously engage in reflective practice.

5. Advise me of *all* pending court dates as soon as you are aware of them *and* of any postponed or settled trials. My goal is to attend as many trials as possible for every student so that I can provide feedback and assistance in preparation as needed.

6. Complete a minimum of four hours of clinical training per credit per week by no later than the last day of classes. *Report your time for the week by 5:00 p.m. Tuesday of the fol-*

lowing week in order to be credited. Turn in the yellow copy of your time sheets to Geri Fox in Room 194, give the white copy to your supervising attorney and retain the pink for your records. *Absent prior permission given for good reason, time turned in late will not be credited.* Clinical training includes, but is not limited to, case work, seminars and training sessions, case reviews, reflective writing preparation and meetings with supervisors.

7. Elect your grading option no later than September 17, 2004. If you do nothing, you will elect the grading option. If you wish to elect the pass/fail option, obtain a drop/add form from Geri Fox and file it at Griz Central no later than September 17, 2004.

8. Complete a final evaluation of your placement, your supervising attorney, your faculty supervisor and the clinical course no later than the last day of classes.

9. Attend an end-of-semester evaluation meeting with your supervising attorney and me at an agreed upon time.

** Any changes in times, dates or locations of scheduled meetings will be posted on the clinical bulletin board located opposite the copy machines. It will also be posted to your e-mail address. Make it a practice to check the board and your university e-mail daily.*

Appendix 3

Prosecution Clinics
Clinical Seminar
Fall Semester 2004 Syllabus - Updated 9/15/04
(All classes in Castles 19 unless otherwise noted)

Wednesday, 8/25/04
2:20 - 3:20 p.m. Orientation Meeting-Room 106

3:30 - 5:00 p.m. First Clinic Meeting
County Attorney - 200 West Broadway
City Attorney—105 East Pine—2nd Fl.

Thursday, 8/26/04
3:10 -4:10 p.m. First Clinic Meeting
United States Attorney
105 East Pine - 2nd Floor

Week of 8/30/04 **No Class on Wednesday, 9/1/04**
Individual Meetings with Prof. Tonon

Be prepared to discuss your Learning Agenda and Self Assessment - Times to be scheduled

Wednesday, 9/8/04
2:20 p.m. **Prosecutorial Discretion/Confidentiality**
Readings: Disciplinary Rules and "The Prudent Prosecutor" by Leslie C. Griffin (will be placed in mail folders)
Assignment: Understand and be prepared to discuss your placement's position on prosecutorial discretion.

Wednesday, 9/15/04 **Tour of the Regional Detention**

Center

2340 Mullan Road - meet at the jail by 2:25 p.m. Use the west entrance marked "Visitors". Security is high - no purses, guns, grenades, knives, metal etc. You will need a government-issued photo ID and will be asked to leave coats in your cars if possible.

Wednesday, 9/22/04

2:20-3:20 p.m. **Supervision Skills**
Readings: Learning from Practice, Ogilvy, Wortham and Lerner (1998) Chapter Three - Learning from Supervision pages 29- 48 - to be placed in your mail folder

3:30-5:15 p.m. **Browning Symposium***
University Center
Sex Crimes, Children and the Federal Sentencing Guidelines

Friday, 9/24/04

8:45-10:30 a.m. **Browning Symposium***
University Center
Juvenile Incarceration

***Browning Symposium lectures listed above are optional and may be used for clinical hour credit.**

FIRST REFLECTIVE WRITING DUE BY 5:00 P.M. ON 9/28/04

Week of September 27, 2004
NO CLASS ON 9/27/04

Individual Case Review with Prof. Tonon at your Clinic Site
Sign up for a time on the door of Room

166. Be prepared to discuss case work and your Learning Agenda.

Wednesday, 10/6/04

2:30 p.m. **Tour of the State Crime Lab**
2679 Palmer (behind Rocky Mountain Elk Foundation Building on West Broadway) Meet at the Crime Lab by 2:25 p.m.

Wednesday, 10/13/04

2:20 p.m. **DUI Field Sobriety Manuevers**
Officer Scott Hoffman and Captain Mike Froelich of the MHP will do a training on the Standard Field Sobriety Techniques (SFSTs) used in the course of a DUI investigation and stop.

Wednesday 10/20/04

2:20 p.m. **Lie Catching Techniques**
Rich Ochsner, a retired detective from the Missoula Police Department, will lead a discussion of common interrogation techniques.

SECOND REFLECTIVE WRITING IS DUE BY 5:00 P.M. ON 10/27/04

Week of 10/25/04 **No Class on Wednesday, 10/27. Individual Case Review Meetings at Clinic Site-See Sign-Up Sheet on door of Room 166**

Wednesday, 11/3/04

2:20 pm **Voir Dire Discussion and Exercise**
Lecture/Demonstrations by prosecutors from different jurisdictions. A student

volunteer from each of the three clinic sites will perform part of a voir dire using the class as potential jurors.

Wednesday, 11/10/04
2:30 pm **TBA**

Wednesday, 11/17/04 **Evidence Lecture and Exercise**

Wednesday 11/24/04
No class - Thanksgiving Break

FINAL REFLECTIVE WRITING DUE BY 5:00 P.M. ON 12/1/04

Weeks of 11/22/04 and 11/29/04
Final Evaluations
Complete self-evaluation and attend meeting with faculty supervisor and supervising attorney at your clinic site according to sign-up sheet.

Appendix 4

Memorandum of Agreement Between University of Montana School of Law and The Missoula County Attorney's Office

I. EDUCATIONAL OBJECTIVES

The Missoula County Attorney's Office is an external placement of the University of Montana School of Law Clinical Program. The Missoula County Attorney's Office functions to prosecute criminal offenses on behalf of the County of Missoula. The educational goals and objectives of this clinic are to enable up to three law students to:

1. Acquire and apply interviewing and counseling skills in the course of representing the State of Montana and victims of crimes;
2. Engage in case planning and implementation of case plans;
3. Acquire and apply negotiation skills;
4. Strengthen legal research skills;
5. Develop and apply legal writing skills in drafting of pleadings, motions, jury instructions, briefs and memoranda;
6. Develop and apply skills in the preparation and presentation of criminal cases before a judicial body;
7. Acquire knowledge in the substantive law areas of criminal law, criminal procedure and local government law;
8. Identify and resolve ethical problems arising in cases;
9. Develop good working relationships with other professionals, including legal and law enforcement personnel; and
10. Develop and apply sound law office management procedures involving caseload management, scheduling, and time and record keeping.

II. THE ROLE OF THE SUPERVISING ATTORNEY

In order to accomplish the above objectives, the supervising attorney(s) shall:

A. Have ultimate responsibility for all legal matters handled by law students working under his or her supervision;
B. Provide, with the faculty supervisor, orientation to all clinic students;
C. Model standard law office practices;
D. Maintain frequent contact with the faculty supervisor;
E. Provide student supervision. This shall include the following:
    1. Conducting regular case reviews with students;
    2. Generally assist students in preparing for court appearances and other major events;
    3. Conducting informal mid-semester evaluation meetings;
    4. Conducting formal, written, end-of-semester evaluation meetings;
    5. Emphasizing with students case development skills and trial preparation;
    6. As pre-arranged by the student with the supervising attorney, being present or arranging for another supervising attorney to be present with students in court except when the supervising attorney and faculty supervisor jointly decide that close supervision is not necessary for a student in a particular matter;
    7. Conducting "post-mortems" with students following every significant clinical event;
    8. In the role of mentor, informally sharing reflections on your practice with students; and
    9. When appropriate, allowing students to act as the primary attorney on the case.
F. Provide the faculty supervisor access to records of pending and completed case work for review and evaluation to enable the faculty supervisor to assist more effectively in the supervision of students and in the

design and implementation of a classroom component for the clinic;

G. Assure that all clinical students, when acting within the scope of their duties, are covered by whatever protection is available to attorneys in the County Attorney's Office for tort liability;

H. Identify as soon as is feasible any problems that arise with respect to a student's performance or ability to perform, and alert the student and the faculty supervisor.

I. Fully comply with all federal and state anti-discrimination laws. This shall include consulting the faculty supervisor regarding appropriate accommodations if advised by a student or faculty supervisor that the student has a disability and is requesting reasonable accommodations.

III. THE ROLE OF THE FACULTY SUPERVISOR

In order to further accomplish the above objectives, the faculty supervisor shall:

A. Engage in the following activities with students:

1. Make case assignments and maintain a calendar of motion, hearing and trial dates for clinical student cases;
2. Moot each student's first two trials or significant court appearances;
3. Hold regular office hours in the County Attorney's Office in a space to be provided by the County for a total of three hours per week;
4. Assist students in identifying certain areas for emphasis and skill development;
5. Meet with students on a regular basis to discuss their work and to assure that the students are advising their supervising attorney of the status of their cases;
6. Critique observed student performances;
7. Evaluate all students, which shall include drafting grading criteria and evaluation forms;

8. Prepare "Evaluation of the Clinic" forms;
9. Encourage reflection by students on the practice of law;
10. Provide students with information about Clinical Expectations;
11. Assist students in specific cases when supervising attorney and faculty supervisor mutually agree such an arrangement is beneficial to both the student and the case, and the faculty supervisor has sufficient time to assist;
12. Troubleshoot, addressing specific problems that arise with individual students;
13. Design and implement the clinic seminar; and
14. Sign clinical absence forms when the supervising attorney is unavailable.

B. Engage in the following activities with supervising attorneys:
   1. Provide specific information in the form of a supervising attorneys' handbook;
   2. Meet with supervising attorneys as a group on a regular basis; and
   3. Serve as a liaison between law faculty and supervising attorneys.

C. Engage in the following activities at the Law School:
   1. Engage other faculty members in assessment and integration of the clinical program in the overall curriculum;
   2. Work with faculty to assure that the curriculum prepares students for their clinical experiences;
   3. Preserve the confidentiality of all client information;
   4. Evaluate potential conflicts of interest within the clinical program;
   5. Develop policies to assure the smooth operation of the clinical program; and
   6. Provide the supervising attorneys with information about any student who has disclosed a disability that will require an accommodation.

The term of this agreement begins on August 24, 2004 and continues through September 30, 2005. It is contemplated that this agreement will be evaluated, modified, and renewed on an annual basis, as needed.

Appendix 5

JUDICIAL EVALUATION FORM
JUDGE_____

Case Name _____ Date _____

Student Name _____ Clinic _____

1. The party opposing the student:
   Appeared: Pro Se _____ By/With Counsel _____
   Defaulted _____

2. Was the student prepared? Yes _____ No _____
   Did the student prepare the client/witness in courtroom procedure?
   Yes _____ No _____ Not Applicable _____
   Comments: _____
   _____

3. Did the student demonstrate a basic understanding of the substantive and procedural law involved in the case before the court?
   Yes _____ No _____ Not Applicable _____
   Comments: _____
   _____

4. Did the student demonstrate an understanding of the applicable Rules of Evidence?
   Yes _____ No _____ Not Applicable _____
   Comments: _____
   _____

5. Was the student's courtroom demeanor appropriate?
   Yes _____ No _____ Not Applicable _____
   Comments: _____

_____

6. Did the student demonstrate effective advocacy in oral and written presentations before the court?
   Yes _____ No _____ Not Applicable _____
   Comments: _____
   _____

7. How could the student's performance have been improved?
   Comments: _____
   _____
   _____

Thank you for your assistance. Please give this form to your Clerk/Secretary to save for the Law School Clinical Supervisor. The forms will be collected on a weekly basis. Your input is greatly appreciated by the Law School and by the students!

Appendix 6

MID-SEMESTER EVALUATION FORM FOR SUPERVISING ATTORNEY

Student: _____

1. Discuss the student's progress and strengths thus far during the semester, giving specific examples.

2. Discuss the student's weaknesses and areas in which you would recommend particular focus during the remainder of the semester.

_____ _____

Supervising Attorney Date

MID-SEMESTER EVALUATION FORM FOR STUDENT

1. Discuss the areas in which you think you have performed well during the semester, giving specific examples.

2. Discuss the areas in which you would like to improve during the remainder of the semester.

_____ _____

Student Name Date

Appendix 7

PROSECUTION CLINIC
EVALUATION

TERM _____

CLINIC _____

Name of Student _____

Your evaluation is based upon both your legal work and your other clinic course work. In assessing your performance, the supervising attorney and Faculty Supervisor consider your effort and attitude, abilities, work product, practical skills, professionalism and the degree of improvement throughout the semester and year.

I. Conscientiousness, Professionalism and Effort

(Including consideration of the extent to which the student has: attended and participated in class sessions and clinic meetings [for in-house clinic use]; been punctual; shown initiative; assumed responsibility for files/projects; maintained witness/client contact; focused on quality of work; followed-through with projects; established a professional relationship with co-workers, clients, witnesses and other professionals; sought advice and guidance when appropriate; worked independently; timely completed assignments; self-assessed strengths and weaknesses; shown willingness to expend time and effort beyond the minimum required.)

Strengths/Areas to Improve and Examples:

II. Interpersonal Skills

(Including consideration of the extent to which the student has: developed rapport with witnesses and other professionals involved in the case/project; elicited essential information from clients and witnesses; listened carefully and respectfully; assisted clients in evaluating alternatives and making decisions)

Strengths/Areas to Improve and Examples:

III. File/Project Development Skills

(Including consideration of the extent to which the student has: effectively engaged in case/project planning, fact investigation, identification and evaluation of legal issues and legal theories; applied law to facts; developed alternative arguments and innovative legal theories; identified evidentiary issues.)

Strengths/Areas to Improve and Examples:

IV. Legal Research

(Including consideration of the extent to which the student has: evidenced basic command of non-computer legal research tools and computer legal research tools; developed effective and efficient research strategies; conducted thorough, careful, and accurate research; managed and organized the results of research.)

Strengths/Areas to Improve and Examples:

V. Oral Communication

(Including consideration of the extent to which the student has: exhibited the ability to express thoughts clearly and concisely, to organize thoughts, to listen and understand others, to speak persuasively, to explain legal/technical concepts in non-legal/technical terms and to conduct a meeting)

Strengths/Areas to Improve and Examples:

VI. Written Communication Skills

(Including consideration of the extent to which the student has: shown proficiency regarding the technical basics such as grammar, spelling, punctuation, organization and proofreading; produced written work that is persuasive and clear; shown sensitivity to tone and other elements that vary with the audience.)

Strengths/Areas to Improve and Examples:

VII. Attention to Ethical Issues

(Including consideration of the extent to which the student has: Identified ethical issues; effectively resolved ethical issues; analyzed and evaluated ethical implications of decisions and acts.

Strengths/Areas to Improve and Examples:

VIII. Law Practice Management

(Including consideration of the extent to which the student has: effectively organized his/her legal work, including creating and maintaining files; effectively set priorities among tasks to be accomplished; maintained file documentation; effectively managed time and time keeping; kept supervisors apprised of the status of cases/projects; provided for an orderly transfer of the project/case and the end of the student's time in clinic)

Strengths/Areas to Improve and Examples:

IX. Litigation Skills

(Including consideration of the following: ability to perform/use opening statement, direct examination, cross examination, oral argument, introduction of evidence, objections and negotiation techniques.)

Strengths/Areas to Improve and Examples:

_____ _____
Supervising Attorney Date

I have reviewed this evaluation.

_____ _____
Student Signature Date

Student Comments on Evaluation:

Supervising Attorney:

While I will be responsible for assigning a final grade for this student, please indicate, if you would like, what letter grade you would assign to this student if given the opportunity. This information will be kept confidential.

I would assign _____a grade of _____.

THE NEW MEXICO DISTRICT ATTORNEY CLINIC: SKILLS AND JUSTICE

Lisa Torraco[*]

I was panicking. Two years of law school behind me and I got lost looking for the courthouse. As I walked into the courthouse, security stopped me. I must not have looked like a lawyer. All the lawyers just walked passed security. I got stopped. I was going to be late to court! My heart was beating so hard in my chest that I thought it was going to jump out of my throat. I could hardly press the elevator button. I rode the elevator to the third floor. It was the longest elevator ride I had ever taken. As the elevator opened, I saw opposing counsel. He looked smart and successful. He looked experienced. I knew I was dead meat.

As I walked into the courtroom, I sized up my case. First, opposing counsel intimidated me. Second, my witnesses, the police, did not want to go to trial. In fact, they were mad at me for taking this case to trial. "It's only a misdemeanor," they said. To me, it was the biggest case in the world. Third, there was no victim on this case. Three strikes against me. With the exception of my professor, I did not feel like anyone was on my side.

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[*] Ms. Torraco is a Visiting Assistant Professor at the University of New Mexico School of Law. She has taught in the New Mexico District Attorney Clinical Program since 1996. Ms. Torraco is a graduate of the University of New Mexico School of Law and a former student of the University of New Mexico District Attorney Clinical Program. She is a former Assistant District Attorney and special prosecutor. She also practices civil law in the Albuquerque metropolitan area.

The author wishes to thank Associate Dean Antoinette Sedillo Lopez, for without her encouragement and support, this article would have not been written. The author wishes to express appreciation to William T. MacPherson for his vision and ongoing commitment to the success of the District Attorney Clinic.

Just before the trial was to begin, my professor whispered something to me. I could not understand a word she said. I did not know she spoke Japanese. With fear, I just nodded my head. The judge called for opening statements. My professor smiled at me with a sign of encouragement. I stood up and began to speak. I survived the opening statement. I hoped I could survive the trial. I just wanted District Attorney Clinic to end.

I was so thankful I was not accompanied by a client. I was able to panic without the fear of letting anyone down but myself. No one was counting on me. No one depended on my expertise. Even my witnesses did not care about the outcome of the case. They had worked all night and they were tired. My witnesses wanted to go home and sleep. It was "only a misdemeanor." I was allowed to make mistakes, I was allowed to stumble through the trial, and I was eventually allowed to succeed.

By the end of the semester and several trials later, I walked past security with confidence. I pressed the elevator button without anxiety. My blood pressure was under control. My supervisor spoke English and I actually understood what she was saying. I could do this! I picked my own jury. The voir dire seemed to flow naturally. I laughed with the jurors. I did my own opening statement, it wasn't bad. It wasn't great, but not bad. I conducted the direct examination of two officers. I cross examined the defendant, AND I did the closing. At the end of the trial, it had been confirmed; I did not make a mistake by going to law school. I belonged in the court room. I had found my place. I did not waste the past two and a half years of my life. District Attorney Clinic had just become one of the best experiences of my law school career. I could do this. I could be a lawyer. I found my niche.

During my semester in the University of New Mexico District Attorney Clinic, I grew as a trial attorney. I left the District Attorney Clinic knowing I can be competent in the courtroom. Today, I am a better lawyer because of this educational experience. District Attorney Clinic was meaningful and worth-

while. It helped to shape who I am as a lawyer today.[1]

Clinical scholars in the United States tend to agree on some basic goals of clinical education.[2] While they may be labeled something slightly different by different scholars, it appears that the longstanding goals of clinical education are skills training and the teaching of social justice.[3] These goals do not change in a prosecution clinic.

Likewise, the goal of the University of New Mexico School of Law Clinical Law Program is to provide a quality educational experience in both skills training and social justice. This goal does not change with the type of case handled. The specific goals of the University of New Mexico Clinical Law Programs remain skills training and social justice regardless of whether the clinic centers on business transactions or criminal law. This paper will examine the objectives of clinical legal education in the context of the New Mexico District Attorney Clinic and how the University of New Mexico School of Law District Attorney Clinic applies these objectives.

I. THE NEW MEXICO EXPERIENCE: A HISTORICAL OVERVIEW

The University of New Mexico School of Law is among the growing number of law schools that strive to reassess and

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[1] These are reflections on the author's personal experience while a student in the University of New Mexico School of Law District Attorney Clinic in 1990. In my present experience as an instructor of the District Attorney Clinic, I talk to many students who share similar insecurities about their purpose in law. Many students seem to have doubts about the decision they made to go to law school, and many feel frustrated as they search to find their "niche" in law.

[2] *See* Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359 (1998)(describing the value of using education as a model for the objectives of clinical teaching); Peter Margulies, *Re-framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605 (1999)(describing empathetic engagement as an objective in clinical education), *cited in* Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307 (2001).

[3] Jane Harris Aiken, *Striving to Teach "Justice, Fairness and Morality,"* 4 CLINICAL L. REV. 1 (1997); Sedillo Lopez, *supra* note 2, at 309 (citing Nina Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31 (1993)).

redefine clinical education.[4] The University of New Mexico offers a wide variety of clinical programs.[5] Among these programs is the District Attorney Clinic. When the clinical programs first began at the University of New Mexico School of Law, the original focus was to help students acquire the necessary skills to practice law in New Mexico.[6] This focus has evolved and expanded to the current philosophy skills training and justice awareness.

One feature that made the University of New Mexico's law clinic different than most other early law clinics was that

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[4] Sedillo Lopez, *supra* note 2, at 308-11.

[5] Other clinical offerings include, but are not limited to, the Southwest Indian Law section, employment law, criminal defense law, and community lawyering. For articles describing the University of New Mexico's Clinical Law Programs, *see* Margaret Martin Barry et. al., *Clinical Legal Education for this Millennium: The Third Wave* 7 CLINICAL L. REV. 1 (2000); Don J. Benedictis, *Learning by Doing, the Clinical Skills Movement Comes of Age*, 76 A.B.A. J. 54 (1990); Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41 (1994); Alfred Dennis Mathewson, *Commercial and Corporate Lawyers 'N the Hood*, 21 U. ARK. LITTLE ROCK L. REV. 769 (1999); Margaret Montoya, *Academic* Mestizaje*: Re/Producing Clinical Teaching and Re/Framing Wills as Latina* Praxis, 2 HARV. LATINO L. REV. 349 (1997); Margaret E. Montoya, Comment, *Voicing Differences*, 4 CLINICAL L. REV. 147 (1997); J. Michael Norwood & Alan Paterson, *Problem-Solving in a Multidisciplinary Environment: Must Ethics Get in the Way of Holistic Services?*, 9 CLINICAL L. REV. 337 (2002); J. Michael Norwood, *Requiring a Live Client In-House Clinical Course: A Report on the University of New Mexico Law School Experience*, 19 N.M. L. REV. 265 (1988); Michael Norwood, *Scenes from the Continuum: Sustaining the Maccrate Report's Vision of Law School Education into the Twenty-First Century*, 30 WAKE FOREST L. REV. 293 (1995); Antoinette Sedillo Lopez, *Teaching a Professional Responsibility Course: Lessons Learned from the Clinic*, 26 J. LEGAL PROF. 149 (2001); Sedillo Lopez, *supra* note 2; Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical legal Education*, 6 CLINICAL L. REV. 127 (1999); Nancy L. Simmons, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico*, 27 N.M. L. REV. 33 (1997); Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. REV. 153 (1996); Scott A. Taylor, *Computer and Internet Applications in a Clinical Law Program at the University of New Mexico*, 6 J. L. & INFO. SCIENCE 35 (1995); Lee E. Teitelbaum et al., *Gender, Legal Education, and Legal Careers*, 41 J. LEGAL EDUC. 443 (1991); Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229 (1999).

[6] *See* Sedillo Lopez, *supra* note 2, at 313.

from the inception the supervision of law students was performed by full time, tenure track faculty members as opposed to adjunct professors or practicing lawyers.[7] In about 1985, the law school changed all of its clinical programs to a six-credit hour format, which is about one third of each student's course load for a semester, and required all law students to enroll in a clinical course.[8] From 1969 to the present, the University of New Mexico law clinic has continued to expand and to innovate clinical teaching.[9]

The law school began many clinical experiences for law students as early as the late 1960s, but none of these programs offered a comprehensive court room experience. A desire for courtroom experience led to the development of the District Attorney Clinic.[10]

One of the first clinical programs at the University of New Mexico School of Law began early in the 1970s[11] as a brainchild of Professor William T. MacPherson.[12] This was the District Attorney Clinic. It was believed that the prosecution of misdemeanor crimes offered all of the basics in trial skills to set the student on a successful path as a litigator. It offered trial preparation, oral advocacy and the opportunities for bench and jury trials. This clinic was the bridge to the practi-

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[7] William T. MacPherson, An Overview of Clinical Legal Education in the United States and at the University of New Mexico School of Law (October 1996) (unpublished manuscript, on file at the University of New Mexico School of Law clinical education office).

[8] *Id.*

[9] *Id.*

[10] *Id.* About the same time, the law school developed a criminal defense clinic called *Centro Legal*. This clinic filled the pubic defender role in the misdemeanor courts. Unfortunately, it dissolved in the 1970s. The University of New Mexico School of Law has had other criminal defense clinics over the years, but none with the same life-span, consistency and continuity as the District Attorney Clinic.

[11] Videotape: Oral history of Clinical Legal Education at the University of New Mexico School of Law: Interview of Professor Emeritus William T. MacPherson (Professor April Land of the University of New Mexico School of Law 2004) (on file with the University of New Mexico School of Law clinical education office) [hereinafter Oral History].

[12] Under the guidance of Dean Thomas Christopher.

cal aspect of law.[13]

The District Attorney Clinic met all the goals for a skills training clinical program. The clinic taught students to study and research case law and rules, prepare cases, investigate facts, problem solve and experience the rigors of the courtroom. It was a perfect environment for the student eager to learn and develop trial skills. Case and legal analysis, research, investigation and interviewing were basics to the course. Arguing motions, negotiating pleas, working with witnesses and trying cases was the pinnacle of the course. These comprehensive experiences lead to the popularity of this specific clinical program. Housed in the office of the Second Judicial District Attorney's office in Bernalillo County, New Mexico, the students handled most of the misdemeanor prosecutions for the office. At the time, these were non-record cases in a small magistrate court.

Even from the beginning, the primary mission of the District Attorney Clinic was to teach and train future trial lawyers. Moreover, at the time the local district attorney's office did not handle misdemeanor prosecutions. These cases were handled by the police officer or were not handled at all. Therefore, the clinic filled a much needed gap.[14] After the two years of the law school handling the misdemeanor prosecutions, the law school urged the District Attorney to develop a misdemeanor division.[15] After opening the misdemeanor division, the District Attorney then contracted with the law school for handling the misdemeanor prosecutions. There was only one Assistant District Attorney assigned to the misdemeanor division and law student assistance was welcome. At that time, the misdemeanor court in Albuquerque New Mexico was not a court of record. The cases were such a small number that the law students could handle most of them. The light

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[13] Oral History, *supra* note 11. This clinic was developed to offer more courtroom time for the law students.

[14] *Id.* This was an important factor in the law school's role in aiding and supporting the community.

[15] *Id.*

case load allowed the students to delve into an in-depth study and evaluation of the cases and gave the District Attorney's office a reprieve from the sometimes mundane processing of the misdemeanor case. Moreover, the misdemeanor cases were simple[16] and could be handled in a single semester.[17] All of the factors were ripe for the professor[18] to develop a trial skills training course.

Over the past thirty plus years, the New Mexico District Attorney clinic has evolved to include new aspects to the program in an attempt to keep up with the changing nature of misdemeanor prosecution.[19] The clinical education program changes as the role of the prosecutor changes. Now, in addition to skills training, the program facilitates independent thinking and community social problem solving. The focus is on the student lawyer and his role and obligations as a professional, not only to the individual case, but also to his community and to the entire criminal justice system, including, the defendant, the victim and, most importantly, to the prevention and solutions of crime. In keeping with the spirit of the University of New Mexico School of Law clinical education philosophy, the District Attorney Clinic emphasizes community lawyering, collaborative and interdisciplinary problem solving as well as the traditional skills training. It is an expansion of basic professional skills training in clinical education.

The current University of New Mexico District Attorney Clinic involves two components. These two components are the classroom component and the courtroom component. After an

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[16] *Id.* It was believed that handling complex cases would not meet the goal of teaching students the basics of trial practice because the students would only get to see a portion of the case during one semester. The original belief was that simple cases that began and ended in one semester would encompass the goal of teaching the basics of trial skills. In theory, the student would be able to handle all phases of litigation, from intake to closing the same case.

[17] *Id.*

[18] *Id.* Even in the early development of the clinical program, clinic instructors were tenure-track professors rather than staff attorneys or adjuncts.

[19] *See* AMERICAN PROSECUTORS RESEARCH INSTITUTE, THE CHANGING NATURE OF PROSECUTION, COMMUNITY PROSECUTION VS. TRADITIONAL PROSECUTION APPROACHES (2004)

introduction to these two components of the District Attorney Clinic and how the skills are taught in the clinic, this paper will examine how the New Mexico District Attorney Clinic addresses the justice facets of criminal prosecution.

PART 1. THE CLASSROOM COMPONENT

Students at the University of New Mexico School of Law must complete a mandatory clinical course as a part of the graduation requirement.[20] Over the years, there have been a variety of clinical courses offered at the University of New Mexico.[21] One of the courses offered since the beginning of the clinical programs at the University of New Mexico School of Law is the District Attorney Clinic. Founded in the early 1970s, this course has been consistently offered at the law school for well over thirty years.

As with all of the clinics at the University of New Mexico School of Law, the District Attorney Clinic is a six credit course that satisfies the clinical graduation requirement. Students are required to attend ninety minute classes, five days per week, and during the first four weeks of the semester, the students must also attend a fifty minute evening class. The classes are designed to familiarize the students with the basics of the law relevant to the prosecution of misdemeanor cases in the Bernalillo County Metropolitan Court and to prepare them for the courtroom component of the clinic.

Unlike the other clinical programs at the University of New Mexico, the District Attorney Clinic is unique from the classically-styled In-House clinic. The District Attorney Clinic is located off campus within the Second Judicial District Attorney's office in downtown Albuquerque, New Mexico. Students attend classes and keep office hours in the District

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[20] Oral History, *supra* note 11. The mandatory clinic requirement was implemented in the early 1970s. Prior to that, the students could substitute their work on the law review for the clinical requirement.

[21] *Id.* The clinical programs at the University of New Mexico School of Law began with *Centro Legal*, a public defender clinic. Over the years, other clinics have been added and some have closed.

Attorney's office in the University designated clinical area. Since conception, the elected District Attorney has accommodated the program.[22] The elected District Attorney has consistently made space available for the program. The space consists of student desks, computers, telephones, work area and a classroom.[23]

The classroom work is extensive during the first month to six weeks of the program. It is a "front-end" loaded class with its primary focus during these first six weeks on academics in the quintessential classroom environment. During this first intensive part of the class, the students work from a textbook designed exclusively for the New Mexico District Attorney Clinic.[24]

The instructional manual developed for the District Attorney Clinic course is called *Crimestoppers.*[25] The original *Crimestoppers* manual for the class was only a few pages. Since that time, the *Crimestoppers* manual has grown to a four volume work that is hundreds of pages long. It is composed of case law, rules, statutes and other materials designed to aid the new practitioner. This four-volume set is also very popular among new attorneys practicing New Mexico misdemeanor criminal law.[26]

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[22] The following is a list of the Second Judicial District Attorneys in office in Bernalillo County, New Mexico since the inception of the District Attorney Clinical Law program: Alexander F. Sceresse 1961-1972; James L. Brandenburg 1972-1977; Ira Robinson 1977-1981; Steve Schiff 1980-1988; Robert L. Schwartz 1988-1996; Jeff Romero 1996-2000; Kari Brandenburg 2000- present.

[23] Over the years, the space for the students has varied. Historically, the District Attorney supplies desks, telephones, copying and secretarial support. The University of New Mexico School of Law supplies and maintains the student computers and internet system.

[24] *See* Martin H. Belsky, *On Becoming and Being a Prosecutor*, 78 N.W. U. L. REV. 1485, 1509 (1984), wherein Professor Belsky calls for better prosecutor training and a better text for training young prosecutors.

[25] The *Crimestoppers* manual is on file with the author and at the University of New Mexico School of Law Clinic office. The *Crimestoppers* name comes from the Old Dick Tracy comic strip.

[26] As an act of good-will, the law school gives the District Attorney's office copies of the manual each semester. The public defender's office and other district attorney's offices throughout the state also receive copies periodically. This manual is used by the District Attorney's office for training and for practical day-to-day

The *Crimestoppers* manual is organized to set the flow for the course. Since the District Attorney Clinic is a misdemeanor prosecution clinic, the case law in the manual is directly relevant to New Mexico misdemeanor law. Driving while intoxicated cases and misdemeanor domestic violence cases are predominate on the student's case load, therefore, the *Crimestoppers* manual contains at least a chapter on each topic. Students study the cycle of domestic violence and other domestic violence issues. Information in the manual includes information from the National Domestic Violence Hotline[27] and focuses on the specific problem of children in domestic violence situations. Other substantive topics in the manual include reasonable suspicion for a stop, search and seizure and *Miranda* issues.

In addition to the substantive law in *Crimestoppers*, the manual is an edited compilation composed of rules and statutes and also of trial scripts, forms pleadings, and other handouts and flyers gathered over the years.[28] It is updated annually. Overturned cases are deleted from the manual and new case law added. New forms, pleadings and even telephone lists are added to the manual. The newest edition of *Crimestoppers* contains information on the national prosecution standards and prosecution misconduct cases. There are also two chapters devoted to professional responsibility and the special responsibilities of the prosecutor. The goal of the *Crimestoppers* manual is to be a complete and comprehensive book designed for the misdemeanor criminal law practitioner.

The New Mexico District Attorney Program is unlike most schools' prosecution externs[29] primarily due to the role of the

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work by the Assistant District Attorneys in the misdemeanor division.

[27] The National Domestic Violence Hotline is a project of the Texas Council on Family Violence, P.O. Box 161810, Austin, Texas 78716. It can be reached by calling 1-800-799-SAFE.

[28] These materials were initially compiled in 1972 by Professor William T. MacPherson and have been edited and revised by Professors William T. MacPherson, Jose Martinez, Lisa Torraco and various students. As the case law, statutes and rules have changed, so has the *Crimestoppers* manual.

[29] The New Mexico District Attorney Clinic operates much like Nebraska's program. *See* Karen Knight, *To Prosecute is Human*, 75 NEB. L. REV. 847, 851

New Mexico faculty supervision.[30] This difference is two-fold. First the New Mexico District Attorney Clinic has faculty housed off-campus who are both administratively and academically responsible for the success of the clinic. Second, the faculty member teaches the required classroom component and supervises the students in the courtroom. In this manner, the faculty member guides the experience from the classroom to the courtroom to ensure that the overall goals of the prosecution clinic are met.

The socratic method is alive in the District Attorney Clinic classroom. The first several weeks of classroom work is an intensive study of the case law relevant to misdemeanor prosecutions. The initial study is relevant to automobile stops, search and seizure and to driving while intoxicated cases.[31] As the students progress through the semester, the classroom work is lightened as the courtroom work increases. As the need for trial skills comes into demand, the students participate in simulations, role plays and mock trials.[32] After the student has mastered the foundational law necessary for successful work, there is a mock trial exercise. Supervisory personnel of the District Attorney's office observe the mock trials and offer critiques. Using both university faculty and practicing prosecutors provides a sensible balance between traditional legal educational values and the goals of producing lawyers with competent litigation skills.[33] The supervisory personnel

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(1996).

[30] "Faculty-supervised clinics in which students personally handle the prosecution of the case are unusual." Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, n.2 (1998); *see also* Craig Mayton, *Misdemeanor Prosecution Practicum: A Clinical Experience*, 8 AM. J. TRIAL ADVOC., 219, 220 (1984) (stating that most schools farm out supervision of the prosecution clinics to the district attorney's offices, but the Ohio State University College of Law in 1983-84 had two course instructors who were both full-time faculty and responsible for courtroom supervision).

[31] *See Crimestoppers* manual, *supra* note 25.

[32] *See* David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 216 (2003). Binder and Bergman state that simulations generate considerable student motivation. Students' understanding that the skills they develop in simulations will transfer into their work on actual cases tends to breed high levels of interest and enthusiasm.

[33] Mayton, *supra* note 30, at 223 n.2 (stating that including traditional faculty

have input into whether they are comfortable having the student represent their office in court. If the student does not meet the standard required by the District Attorney, the student must polish his or her skills until he is at an acceptable level of competence.

After the first six weeks and the completion of the mock trial, the students begin to work on finer points of law and evidence to complete their skills training. Classroom time is devoted to trial techniques such as examination of witnesses and trial objections. Students will conduct mock trial skits such as a practice voir dire, witness examination or opening statement. Other students are encouraged to assist in the critique. As the semester progresses, one class a week is dedicated to a staffing. At the staffing, students are encouraged to share experiences, insight and solutions with one another.[34]

As the focus of the clinical program moves from the classroom into the courtroom, the students become energized. The courtroom component is about to begin and this promise offers the student the bridge to the practice of law. In the classroom, faculty can hypothesize about the role of the prosecutor, yet in the courtroom students bring in their actual experience of prosecutors' exercise of discretion. The faculty can consider the dilemma of the prosecutor and the domestic violence victim, and the students can share real-life experiences of triumph and defeats. The faculty can discuss the institutional problems of case management, while students search for a better way to problem solve and manage cases. The faculty can discuss theories of crime and punishment, and the students share justice and injustice experiences of bond hearings, trials, sentencings and probation revocations.[35] The classroom comes alive with

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in the clinical program with University staff attorneys provides a sensible balance between traditional legal educational values and the goals of producing lawyers with competent litigation skills).

[34] *See* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinic*, 2 CLINICAL L. REV. 37, 57 (1995). The author demonstrates that adult learners find peer learning the most effective.

[35] Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So*

life experience and the students move from theory to the real-world. The walls of the law school classroom have expanded beyond measurable increments.

PART 2. THE COURTROOM COMPONENT

An experienced prosecutor's advice to new assistant district attorneys: You will wield an amount of power over people's lives entirely disproportionate to your age and experience. Don't let it go to your heads.[36]

As the first six weeks of the semester come to a close, students change focus from the academics of the classroom to the practice of law in the courtroom. Students are assigned cases and begin to apply the academics they have learned in the early part of the semester to their cases. While the classes and course work continue throughout the semester, the evening classes come to a close and the classroom work is reduced to only a few times a week rather than every day.

The students begin their journey into the courtroom. Starting the seventh week of class, all students handle two dockets of active cases per week within the District Attorney's office. The quick pace of misdemeanor prosecutions provides ample courtroom and trial work. The cases are simple, straightforward and repetitive. They are easily managed in the ten remaining weeks of the semester. The majority of the student case load is composed of either the misdemeanor Driving While Under the Influence (D.W.I.) case or the misdemeanor domestic violence case. While there are other cases that may be handled by the student lawyer, this composes the lion's share of the case load.[37] These cases offer both a skills and a justice component to the clinic.[38]

Shall You Reap, 5 CLINICAL L. REV. 527, 549 (1999).

[36] DAVID HEILBRONER, ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A. 18-19 (1990).

[37] Other cases include: Driving on a Revoked license, Prostitution, Patronizing a Prostitute, Eluding or Evading an Officer, Resisting Arrest and Shoplifting.

[38] *See* Sedillo Lopez, *supra* note 2, at 310. The author states: "I believe that of all the pedagogical objective described by clinicians further the two key components of the mission of clinical legal education: 1) skills training mission . . . 2)

The D.W.I. case includes all facets necessary to a trial skills course. It has scientific evidence, foundational requirements, opinion testimony by experts and lay witnesses, qualifying witnesses as experts, and direct and circumstantial evidence. The prosecution model to clinical education offers a myriad of lawyering skills. Students negotiate case resolutions, interview witnesses and prepare their witness examinations. They make opening and closing statements, argue motion hearings and conduct voir dire. Students in the courtroom component of the District Attorney Clinic gain real life experiences in law that cannot be accurately replicated in the traditional classroom.[39]

This clinical program offers one of the best opportunities for a law student to litigate cases. On the average, students leave the District Attorney Clinic having conducted approximately five to eight bench trials and often one or two jury trials. This breadth of experience allows the student to experiment with various trial techniques and styles. It gives them the opportunity to gain confidence and develop an ease in the courtroom. It gives them a broad range of trial experiences. Many times, these experiences are unexpected, and the ability to handle the unexpected helps the student to develop a sense of security and confidence in each of these new situations.

The University of New Mexico District Attorney Clinic diverges from other clinical programs in how it obtains its cases. Unlike most clinical programs, the University of New Mexico District Attorney Clinical Program does not have control over acceptance of cases. The students handle cases that appear on their assigned dockets. While there are always ethical considerations that guide whether the case shall actually be pursued, the cases are already active in the Metropolitan Court at the time the student accepts the file.[40]

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the social justice mission—teaching students about serving the needs of the poor and access to justice." (footnotes omitted).

[39] *See* Smith, *supra* note 35, at 534.

[40] The prosecutor and the student lawyer have tremendous discretion in case handling. Because the New Mexico student prosecutor is governed by the New Mexico Rules of Professional Conduct, N.M. RULES OF PROF'L CONDUCT 16-308

By not pre-selecting cases, the District Attorney clinical students are exposed to a broader range of case quality. This gives them an unsheltered view of prosecution. Students cannot "pick and choose" their prosecutions and many times get "stuck" handling cases that oppose their personal philosophical views.[41] They may also find themselves in situations that lead to conflicts of interest or other ethical dilemmas.[42] Both of these possible scenarios lend themselves to rich learning experiences. Most importantly, the students get a realistic view of the role of the prosecutor in a myriad of legal situations.

Case assignment in the District Attorney Clinic is almost identical to that of the other assistant district attorneys. Like the assistant district attorneys, the students are assigned to a judge in the Bernalillo County Metropolitan Court.[43] Students then handle all the criminal cases the judge is hearing on that given day. The students will appear before that judge for one week. The students then rotate from one judge assignment to another. The clinical goal in appearing before many judges in one semester allows the student to see justice disbursed differently depending on the trier of fact. The students may appear before as many as nine or ten different Metropolitan Court judges during a semester.[44]

The logistics of the class center on the class size and the judge's docket. The class limit is eight students; thus, two students are assigned to attend court each day. Students do not attend court on Fridays. A faculty member supervises each

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(2004), the student has discretion to dismiss actions not in conformance with the lawyers' professional responsibility.

[41] For example a student active in drug reform may be required to prosecute a misdemeanor possession of marijuana case.

[42] It has not been uncommon for a student to arrive at court and realize that the defendant she is prosecuting is her neighbor or colleague. Many times this conflict is not realized until the student sees the defendant, as many names may be common.

[43] *See* N.M. STAT. ANN. § 34-8A-4, Bernalillo County Metro. Ct., *available at* http://www.metrocourt.state.nm.us (noting there are sixteen Metropolitan Court Judges, thirteen of which are assigned to the criminal bench) (last visited Mar. 10, 2005).

[44] *Id.*

group of two students at a time in court. The number of cases on each judge's docket ranges from four to sixteen cases. On an average docket, each law student would handle anywhere from two to eight cases with faculty supervision. Many of these cases are continued or a plea is negotiated. On occasion, a case will go to trial. Students often put a tremendous amount of time into preparing the cases in the event that it may go to trial. In the Metropolitan Court, it is never certain when a case will go to trial until the day of the hearing. This puts great pressure on the student to have each case fully prepared for trial. While most cases are resolved short of trial, the student benefits from trial preparation. On average, most students will prepare an uncountable number of trials per semester.

The most essential criteria and learning experience for the student in the courtroom component of the clinic is case preparation. Students must thoroughly review each case file as assigned. Students are responsible for applicable discovery and witness interviews and must fully prepare the case for trial. Each student must keep office hours and demonstrate an attitude of professionalism and a work ethic comparable to that of the most successful lawyer. Cases must be reviewed and analyzed with the professor well in advance of the court date. Many times, the initial review with the professor results in the student being sent away to conduct more preparation and a second, and sometimes third, review is scheduled. The students may not present cases that do not have the approval of the professor. In the event the student has not adequately prepared the case, the professor may be in the position of handling the case herself! Both the student and the professor are motivated to ensure that the case is adequately prepared.

The District Attorney Clinic is a course in applied ethics.[45] Discretion is promoted. Students dismiss actions that are not supported by probable cause. Students have discretion in plea offers and sentencing presentations. While discretion is encouraged, all of these actions must be performed under the

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[45] Knight, *supra* note 29, at 862.

direction of faculty supervision.

In the courtroom component, the students attend court twice a week. The law students' appearance in court is guided by the New Mexico Rules of Procedure permitting law student appearances.[46] This rule allows law students to act as if they are lawyers in the handling of cases in the New Mexico courts.

In the beginning of the courtroom component, the faculty member plays an active role in the adjudication of the case. The student role is that of a trial assistant or a second chair attorney. As time passes and the student's confidence and skill level increase, the student will begin to take more of a lead in the prosecution. By the end of the semester, the student should be able to handle all cases on the docket with some expertise and confidence while the faculty member can second chair the case. Most times, the faculty member can remain at counsel table, confident that the prosecution is in competent student hands. This spectrum of growth, from the student as a trial assistant to the student as lead counsel, has become predictable. By the end of the semester, most students master a level of competency equal to that of a well-qualified misdemeanor assistant district attorney.

At the conclusion of the courtroom docket, the faculty member and the student review the activities of the day. The faculty member "de-briefs" the student, reviewing each case and each oral argument, play by play. It is the hope that this type of detailed critique shall inspire and encourage the student to enhance their performance for the next docket day.

There are several factors that contribute to the success of the courtroom component of the University of New Mexico District Attorney Clinic. These factors include, but are not limited to: the commitment of the faculty and faculty supervision, the law school relationship with the District Attorney, the cooperation of the bench and the relationship with the police and other agencies.

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[46] N.M. RULES ANN. § 1-094 (2004).

Faculty Commitment and Supervision

The success of the long-standing University of New Mexico District Attorney Clinic is due to many factors. Faculty commitment and supervision is just one of these factors. The presence of faculty has been a stabilizing component of the New Mexico District Attorney clinical experience. The value of faculty is two-fold. First, stable and consistent faculty adds to the quality and longevity of the program and, second, faculty supervision is a key part of the success of the court and classroom components.

The faculty within the District Attorney Clinic has made long-term commitments to the program.[47] In this environment, the professor does not have to re-learn the District Attorney and court policies and procedures. Instead, the professors are proficient in these areas and can focus on ways to improve the clinical program. In practical application, the faculty of the University of New Mexico District Attorney Clinic have been working cases and setting misdemeanor policy longer than the elected District Attorney in office or much of her staff.[48] Retention of faculty protects the students from many of the stumbling blocks of early legal practice.

Stable and consistent faculty tends to isolate the program from many of the pitfalls of the prosecution practice. The faculty learning curve does not have to be redeveloped each semester. Faculty knows the staff at the District Attorney's office, knows the policies and procedures of the District Attorney and is not in a position to learn the protocol as the students learn the same. Moreover, the faculty has become culturally a part of the district attorney's office and of the court.

Stable and consistent faculty has greater expertise and

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[47] Founding Professor William T. MacPherson still teaches in the District Attorney Clinic on Emeritus status. The author has taught in the District Attorney Clinic since 1996. Previous professors have made similar long-term commitments to the District Attorney Clinic.

[48] The current District Attorney was elected in 2000. *Compare supra* note 22 (relatively short election terms for district attorneys), *with supra* notes 1, 18, 47 (long term commitment of faculty and staff), *and infra* note 49 (long term commitment of faculty).

working knowledge of the applicable law and rules. There is a historical knowledge that surpasses the case law. It is this historical and institutional knowledge that makes stable faculty worth much more than their years. New Assistant District Attorneys turn to the clinical professors for guidance and counsel. Likewise, many judges take the bench and turn to clinical materials for guidance and defer to the District Attorney clinical faculty. In sum, stable faculty has made the University of New Mexico Clinical Program an institutionalized part of the misdemeanor culture in Bernalillo County, New Mexico.

Faculty also has an important role in supervision of law students.[49] Faculty supervision is a valuable part of the program and a second aspect to the success of the clinic. The faculty closely supervises the student in court. It is well established that this supervision will be real and not perfunctory.[50] The clinical faculty is responsible for the competency of the student prosecutors and their compliance with professional obligations.[51] The clinical program, the District Attorney and the courts demand it. The faculty is present and always available for questions. Without competent supervision the students' experience will amount to a "trial and error," "sink or swim" or another rapid training, or lack thereof, experience. None of these are consistent with the goals of legal education.[52]

The Relationship with the District Attorney

A second factor in the success of the District Attorney Clinic is the relationship with the Office of the District Attorney.[53] Part of this relationship is ensuring that the clin-

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[49] *See* Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 329 (2001) (explaining what role clinicians might play in teaching social justice in clinics).

[50] *E.g.*, Montana v. Schwictenberg, 772 P.2d 853, 855 (1989).

[51] MODEL CODE OF PROF'L RESPONSIBILITY R. 5.3(b) (2002).

[52] *See* Sedillo Lopez, *supra* note 2.

[53] Caplow, *supra* note 30, at n.3 (stating that "[s]tudent prosecutor programs are wholly dependant on the cooperation of the office with which the clinic is

ic is a benefit to the District Attorney, not a burden. The District Attorney must want the program to exist as much, or in some cases more, than the law school.

The National District Attorney's Association encourages law school clinics within the District Attorney office.[54] From the viewpoint of the prosecutor, the clinical program serves two primary purposes: first, the law school has an opportunity to train students who gain real life experiences that develop their skills in preparation for practice. Second, the District Attorney's Office receives assistance from the law school in handling cases, research and legal writing. District attorneys' offices are in need of trained and skilled prosecutors and certainly could use help with their caseload. The benefit is an exchange of resources.

The students in the prosecution program can lighten the work load for the busy and sometimes overwhelmed assistant district attorneys. The court in which the District Attorney clinical program takes part is the Bernalillo County Metropolitan Court. It is the most voluminous court in the state of New Mexico, handling fifty percent of all cases in the state of New Mexico.[55] Much of these cases are handled by relatively new Assistant District Attorneys, who may not have all of the skills and expertise required for such a monumentous task. In addition, the professional life of a new assistant district attorney is short lived. Once trained, most attorneys move on to a more glamorous professional life, either in the felony division or in private practice. What is left is a District Attorney's office that may be less than perfectly equipped to handle the large volume of cases.

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affiliated").

[54] NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 32:2 (2d ed. 1991). Standard 32.2 of the National Prosecution Standards states "[t]he prosecutor should actively cooperate with law school clinical programs for prosecution where they exist and actively promote their creation where they do not." The prosecutors' interest in clinical education is "to foster and encourage interest in the prosecutorial field as a career choice and, secondarily, to supplement the resources of his own office."

[55] *See* N.M. STAT. ANN. § 34-8A-3, Bernalillo County Metro. Ct., *available at* http://www.metrocourt.state.nm.us (last visited Mar. 10, 2005).

One of the long-term benefits of a clinical program is that the District Attorney's Office has the opportunity to train and evaluate future hires. The supervisors of the District Attorney's office observe the students in the office, seeing how they interact with their colleagues, the staff and with supervisors. They observe the students to see if their personality will have the right "mix" for the office. Some students are very respectful of the needs of others, and unfortunately, there are also students who are unresponsive to supervision or are disrespectful to secretaries and other personnel.[56]

The District Attorney observes the student's work and assesses their overall ethic. The district attorney supervisors watch the students and evaluate their skills and how they interact with the bench and the defense bar. They can assess the students' abilities, skills, ambitions and judgment. When these students become new lawyers and apply for a job in the District Attorney's office, the district attorney has a base from which she can fairly evaluate the applicant's skills. In addition, when the district attorney hires new attorneys who graduated from the program, the new lawyer is trained in much of the case law and the rules. The new lawyer from the clinical program has some experience in the courtroom and will already have an understanding of the process. New lawyers from the clinical program should be able to "hit the ground running" with minimal training after passing the bar.

A consideration for the District Attorney is the faculty component. The District Attorney must have a certain level of respect and trust in the faculty supervisors. Since the faculty has complete control over many of the District Attorney's misdemeanor cases, there must be confidence that the faculty will appropriately handle and dispose of cases in a manner consistent with the District Attorney's policies. If this respect

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[56] I had one student who yelled at a secretary for what he perceived as her incompetence and shortly thereafter he applied for a job in the office. Needless to say he was not hired. There have also been students who work overtime, are polite, considerate and excelled in court. I have had students bring donuts for secretaries and leave support staff 'thank-you' notes at the end of the semester. These are the students that are actively recruited by the office.

exists, then there are additional benefits to the District Attorney and her office.

The clinical faculty offers training and support to the new Assistant District Attorneys. Faculty are available to assist new attorneys on difficult cases. They can serve as lead counsel or as advisors. In the past, faculty has handled conflict cases for the district attorney. They also conduct training and Continuing Legal Education courses for the Assistant District Attorneys.

Finally, the faculty-student team handles cases and lightens the caseload for the Assistant District Attorney. Under faculty supervision, students also research and write for the assistant district attorneys.

> *In one case, the defense brought the issue of the constitutionality of a criminal solicitation ordinance before the court. The young assistant district attorney was surprised by the motion and did not know how to respond. She asked for a continuance. The case was reset in a short period of time, and the attorney had a full caseload until that date. She had very little time to research the issue and much less time to fully brief it. The students energetically offered to brief and argue the motion. It was an excellent opportunity for the students to study and apply constitutional principles and it gave a much needed relief for the assistant district attorney.*[57]

The students are able to make extra time to work with victims and build relationships with witnesses. Students can make telephone calls on behalf of the office and can meet with victims more frequently than the busy assistant district attorney. Students can gather facts and do additional investigation.

To date, the relationship between the District Attorney and the University of New Mexico School of Law has been a positive one but it is not a relationship to be taken for granted. The District Attorney Clinical faculty must constantly remind itself that it is a guest in the home of the District Attorney and leave that home better than it was when first visited. Students and

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[57] Personal recollection of the author, Metropolitan Court case.

faculty must respect the District Attorney's policies and abide by the procedures. The clinical program must set a standard of excellence that surpasses all others and must never stain or debase the reputation of the office. Everything must be handled in the utmost professional manner.

Cooperation of the Bench

A third factor in the success of the courtroom component is the cooperation of the Metropolitan Court bench. The judiciary is an essential part of the District Attorney Clinical Program. Without the cooperation of the bench and bar, the prosecution clinic would be a struggle. Most of the judges on the Metropolitan Court are former University of New Mexico School of Law alumni and are familiar with the District Attorney Clinical Program. As a result, judges in the Metropolitan Court look forward to having law students appear in their courtroom.[58] In New Mexico, there is an acceptance of the clinical programs by the courts and the legal community.[59]

Many times, students are better prepared for court than the Assistant District Attorney. This is often true because the student's caseload is significantly less than that of the Assistant District Attorney. The Assistant District Attorney in the Bernalillo County Metropolitan Court is often a new and inexperienced attorney. The student, on the other hand, while also new and inexperienced, has the benefit of direct and close supervision of an experienced University of New Mexico School of Law faculty member. The supervision of the Assistant District Attorney is significantly less. Moreover, the student is often highly motivated by the grade and by other course expectations. The student is more apprehensive of the unknown and often over-prepares for every imaginable scenario.

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[58] I have had judges seek me out to ask me when the law students will be appearing before them, extending a welcome to the refreshing and enthusiastic experience that the law student adds to the courtroom dynamic. The reception has always been a welcoming one. *But see* Caplow, *supra* note 30.

[59] The Court must sign an 'Order Allowing Law Student Appearance' one each case for the student to practice. N.M. RULES ANN. § 9-902 (2004).

In general, judges are impressed and pleased at the performance of the students. Students are not given differential treatment. In fact, differential treatment could be disastrous. A presiding judge cannot and should not help equalize what he perceives to be a disparity in the trial abilities of opposing counsel. This practice is apt to proceed from disparity in the rights of one side or the other, rather than the preparation or ability of counsel.[60] The court must have the same expectations of students as those of any other practicing attorney. While the court is aware that a law student is practicing before the court,[61] there is no other distinction. Because the students are expected to perform at a level equal to, or surpass the competency of other attorneys, the judges welcome students in their courts.

Relationship with the Police and Other Agencies

While the relationships of the clinical program with the District Attorney and with the judiciary are of paramount importance, they are not the only two that are worth mentioning. The third relationship is more problematic. That is the relationship of the District Attorney Clinical Program with the police and other advocacy agencies.[62] While overall this relationship remains good, it is certainly not without its share of problems. In fact, it may be described as turbulent romance. The police are witnesses on most all cases prosecuted by the students. They are an integral part of the system. However, at times the actions of the police and the interests in the student prosecutor collide.

In recent history, there have been several instances that kept the police at odds with the student prosecutors. In one instance, the clinical faculty reported two officers to the inter-

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[60] Iowa v. Glanton, 231 N.W.2d 31, 35 (1975).

[61] N.M. RULES ANN. § 9-901 (2004).

[62] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 759-60 (1986) ("The office of the prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies," including the police, victims of crime, other government agencies and the courts).

nal affairs, resulting in removal of a sergeant.[63] This had a chilling effect on the police relationship with the faculty and students for a brief time. On another occasion, students prosecuted an active duty police officer.[64] Enthusiastic constitutional students have been known to tell officers how they violate defendant's constitutional rights. This happened one time when the students attended a sobriety check point as a mandatory part of the course.[65] Their insight, accurate or not, was not appreciated by the over-zealous officers.

While the relationship with the police is not a success maker or success breaker, it is certainly a factor to be considered. Realistically, there will always be a tension between the police and the prosecution. However it is always best to keep communication lines open between faculty and police administration.

Other agency relationships contribute to the success of the clinical program. Probation officers, victim advocates and other activist groups can play a role in the success of the clinic. While the District Attorney has a tremendous responsibility to respond to diverse constituencies and often conflicting expectations, the student clinic does not have to appease each of these constituencies. However, it is the experience of the District Attorney clinical faculty that success lies in relationship building with the various community groups. The relationships with these groups may not always be positive, but communication is the key to success. It has also proven beneficial for the commu-

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[63] Internal Affairs records are confidential. However, note that the Sergeant and patrol officer were removed shortly thereafter and transferred to a different unit.

[64] State of New Mexico v. Samiego, Bernalillo County Metropolitan Court, No. DV 3131-98 (1998) (unpublished). In this case, the defendant was a police officer accused of domestic violence. He was found not guilty and is still employed by the New Mexico State Police. He often appears in court when the students are present. Not only does this create an actual conflict of interest, it is just plain uncomfortable for everyone involved.

[65] While versions of this event vary, it seems that while in the field with the officer, the students joked with the officers about the constitutionality of the roadblock. Suspects and some member of the public were present and may have overheard. The officer apparently did not see the humor in the students' comment. Officers formally complained about the students' behaviors.

nity to be aware of the role of students in the District Attorney's office.

II. Teaching Justice in a Prosecution Clinic

Skills training is the classical goal of most clinical programs. The District Attorney Clinic is no different. The classroom, the manual and the courtroom experience are all designed to equip the student with the necessary skills to handle the misdemeanor case. The goal is that by the end of the semester the student can handle the misdemeanor case with confidence and ease. However, the District Attorney Clinic goes beyond teaching skills.

The student should leave the course with a heightened awareness of the role of the prosecutor in the community. The student should view the role of the prosecutor as a community leader and problem solver. The student should have a grasp of a deeper ideology of seeking the truth, seeking justice and a fair and equitable outcome. The student should be able to view the trial as an arena for seeking the truth. The student should understand the prosecutor's need to practice law with integrity and honesty. It is these types of moral values and ideology that should come into play in the training of prosecutors.

It has long been established that the prosecutor's duty is to seek justice.[66] The difficult question is how does one "seek justice" or rather "what is justice" in any given situation? Justice is a moral ideal, one that may not always be fulfilled, but one that may be sought.[67] Law is not necessarily just, but it does promise justice.[68] So with this backdrop, how can one teach "justice," if justice is such a complex thought that may or may not exist in reality? It is a tremendous task.[69]

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[66] *E.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1962) (stating that prosecutors should seek justice and not victory); Berger v. United States, 295 U.S. 78, 88 (1934) (stating "in a criminal prosecution is not that it shall win a case, but that justice shall be done"); American Bar Association, Model Rules of Prof'l Conduct EC 7-13 (1980).

[67] *See* Jeremy Waldron, *Does Law Promise Justice?*, 17 Ga. St. U.L. Rev. 759, 788 (2001).

[68] *Id.*

[69] *But see* Kaufman, *The Scientific Method in Legal Thought: Legal Realism*

One goal of the District Attorney Clinic is to show the student how justice is applied and how the actions of the prosecutor impact the community.[70] The problem with this type of training is that "justice" is a subjective concept. It is difficult to teach "justice" as a moral principal or perception.[71] The concept of justice may vary from person to person, with each individual having a different concept of what end result would constitute "justice." Not everyone's ideas of righteousness, justice, goodness, and truth comport with one's own.[72]

Justice takes on many forms in the prosecution clinic. One form is defining the role of the prosecutor in the pursuit of justice. While it is not clear exactly what justice in any given situation is, many have written on this complex subject.[73] Perhaps it is not so much of how to define "justice" but (i) how people decide what justice requires and (ii) who the "people" are who decide what justice requires.[74] It is a goal of the District Attorney Clinic to instill in the students the principal that prosecutors are pursuers of truth and justice. This ideology is a principal that is woven into many different aspects of the

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and the Fourteen Principles of Justice, 12 ST. MARY'S L.J. 77 (1980) (stating there are fourteen principles of justice – all of which are clear and concise and could be taught in a clinical course setting).

[70] The role of the professor in justice awareness is eloquently written about in Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 1 (2001).

> I aspire to be a provocateur for justice. A provocateur is one who instigates, a person who inspires other to action. A provocateur for justice actively imbues her student with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice.

Id. at 287-88.

[71] *See* Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialog About Goals*, 39 WM. & MARY L. REV. 457, 470 (1998).

[72] *See* Raymond B. Marcin, *Justice and Love*, 33 CATH. U. L. REV. 363 (1984).

[73] *See, e.g.*, Dennis E. Curtis & Judith Resnick, *Images of Justice*, 96 YALE L.J. 1727 (1987); Kaufman, *supra* note 69; WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 26-76 (1998).

[74] Thomas L. Shaffer, *Should a Christian Lawyer Sign up for Simon's Practice of Justice?*, 51 STAN. L. REV. 903 (1999) (comparing Professor Simon's definition of justice from the Biblical definition).

course, from the classroom to the courtroom.

There are many definitions of "justice" espoused by various legal philosophers.[75] At the University of New Mexico District Attorney Clinic, we discuss three types of justice. They are: (i) ethics and professional responsibility, (ii) an analysis of individual case justice; and (iii) community justice.[76] This paper will examine all three types of justice and ways these concepts can be introduced, discussed and perhaps instilled in the prosecution clinical student.

Ethics and Professional Responsibility

The Code of Professional Responsibility[77] is a backdrop to the practice of law. This is the teaching of the law of legal ethics.[78] In addition to the Code of Professional Responsibility are the special responsibilities of the prosecutor and the basic principals of professionalism. All should be taught and modeled in a prosecution clinic. The University of New Mexico District Attorney Clinical Program assumes that part of the skills-training experience includes professional responsibility and the inculcation of professional values. While our duty as clinicians is to teach the law, additional educational objectives should include other skills, such as professionalism, that will affect their lives as future lawyers.[79]

The American Bar Association states that the duty of the prosecutor is to "seek justice, not merely to convict."[80] This duty to seek justice[81] should be a mission of the prosecution clinic. While the concept of justice can be a subjective and innocuous one, it is nonetheless an important one. One way to discuss the concept of justice is through the Code of Profession-

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[75] Marcin, *supra* note 72, at 363.

[76] University of New Mexico School of Law Associate Dean Antoinette Sedillo-Lopez first articulated these three 'layers' of justice taught in the District Attorney Clinic.

[77] MODEL CODE OF PROF'L RESPONSIBILITY (1995).

[78] Lerman, *supra* note 71, at 469.

[79] Sedillo Lopez, *supra* note 5, at 152.

[80] MODEL RULES OF PROF'L CONDUCT EC 7-13; R. 3.8 cmt. 1.

[81] Berger v. United States, 295 U.S. 78, 88 (1934).

al Responsibility.

Paramount in a prosecution clinic is the teaching of professional responsibility and ethics. This takes on many levels. The students are formally trained in the Code of Professional Responsibility and applicable case law. Socratic discussions regarding professional responsibility and prosecutions inevitably include moral and ethical decisions that are not outlined in the Code. Professionalism is part and parcel of professional responsibility.

Discussions about professionalism also include basic tenets of professional behavior and professional values.[82] There is an emphasis on the social duty to treat all persons, from judges to defendants with respect and dignity. This type of professionalism is a small part of disbursing justice. "People come to the court to be heard. They have a right to expect that in presenting their grievances they will be treated with respect."[83] "The poorest, weakest most hapless or illiterate defendant standing before an American court, is entitled to exactly the same respect, rights and hearing as would be the Chief Justice of the United Stated standing before the court and similarly accused."[84]

Treating others with dignity and respect is so basic to human behavior it should not have to be taught. Sadly, sometimes it must be. So while formal codified professional conduct is taught, likewise are fundamentals of human interaction. The basics of professional human interactions can be taught through modeling or role playing and can be discussed in the classroom or as a part of an after-court de-briefing session. Whatever the method, the importance of professionalism in human interaction may need to be addressed as well as the Rules of Professional and Codes of Conduct.

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[82] *See, e.g.,* Lisa Torraco, *Be Nice!—and Other Basics of Professionalism*, BAR BULLETIN, May 13, 2004, at 6.

[83] *In re Albano*, 384 A.2d 144, 146 (1978).

[84] *In re Yengo*, 371 A.2d 41, 56-57 (1977), *cited in In re Albano*, 384 A.2d at 146.

Individual Case Justice

A second form of justice is helping the student find a just and equitable outcome in each case. William Pincus identified the pursuit of justice as a primary educational value in clinical experience for law students.[85] Clinical education "can develop in the future lawyer a sensitivity to malfunctioning and injustice in the machinery of justice and other arrangements of society."[86]

This individualized justice seeks the prevailing standard of justice in the community, and treats like cases in a like manner. Faculty members spend considerable time with the student evaluating the case. In domestic violence cases, the student will have interviewed the victim and witnesses prior to meeting with the faculty member to discuss the proposed end result of the prosecution. The input of the victim may be valuable toward determining the "just" result of that case.

The teaching of individual case justice is not an easy task, as differing minds have differing ideas of what is a "just" result. Whether a defendant deserves jail time, counseling, probation or a dismissal can lead to a rich discussion. Since justice can be subjective, many times the goal of the faculty is merely to raise awareness as to the justice issues. Helping a student become sensitive to justice issues is as great a goal as defining the "just" outcome of the case.

Disciplinary cases of prosecutors can be a good segway into justice discussions. The District Attorney Clinic opens with the case of Daniel Lindsey.[87] This is a New Mexico case involving a prosecutor who loses perspective of his work. This case is set upon a backdrop very similar to that in which the District

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[85] Wizner, *supra* note 49, at 331.

[86] William Pincus, *Educational Values in Clinical Experience for Law Students*, II CLEPR Newsletters, No. 1, Sept., 1969, *cited in* Wizner, *supra* note 49, at 331.

[87] *In re Lindsey*, 810 P.2d 1237 (1991). In this case, a misdemeanor prosecutor is faced with the dilemma of his police officer witness having moved from the jurisdiction and unable to attend court. *In re Lindsey*, 810 P.2d at 1238. The prosecutor has another police officer come to court and impersonate the witness by taking off his name badge and representing himself as the other officer. *Id.* The prosecutor is able to secure a plea under this false representation. *Id.*

Attorney Clinic is set. Both settings involve misdemeanor prosecutions in which a witness fails to appear, an unfortunately common scenario in the District Attorney Clinic. It is a case that subtly discloses the pitfalls of "prosecution by ego" or "prosecution for power." New lawyers often lose perspective of what their legal responsibility and goals are in the District Attorney's office. *In re Lindsey* is a perfect study of the real life consequences of our actions. It can also be a great illustration of the importance of professional reputation. *In re Lindsey* demonstrates the great value and need for integrity in prosecutors.

Another approach to learning about justice in any individual case is that of a "victim-centered" approach.[88] Being sensitive to justice many times includes understanding the needs and wants of the victim. When the interests of the victim do not conflict with preemptive justice goals, the prosecutor is often viewed as representing the victim's interest to the defense and to the court.[89] This victim-centered prosecution has the prosecutor consider the harm suffered by the victim and the victim's goals in calculations of "justice".[90]

New Mexico has a constitutional amendment requiring the prosecutor to maintain contact with the victim and notify her of hearings.[91] With cooperative victims, this is an ideal method in which to center the case. This is problematic with uncooperative victims. "Whether it is more noble to represent the individual charged with rape or to represent the state in prosecuting him is a question of personal values and philosophy. It is, at a minimum, not ignoble to seek to bring to justice people who have criminally victimized others."[92]

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[88] Caplow, *supra* note 30.

[89] *Id.* at 10.

[90] *Id.* at 12.

[91] N.M. CONST. art. II § 24 (stating that victims of certain enumerated crimes have certain rights outlined in this section, one of which is to be notified of court proceedings and the right to information about conviction, sentencing, imprisonment, escape or release of the accused).

[92] Knight, *supra* note 29, at 866.

Community Justice

The role of the modern day prosecutor has evolved and become more complex over the past years.[93] The prosecutor's office has been directly affected by the increasing complexity of the law, the justice system and the public's demand that the prosecutor be involved in the more public issues.[94] In addition to the traditional range of criminal cases, district attorneys are also becoming involved in welfare fraud, environmental law enforcement and rehabilitation programs.[95]

Now viewed as a community leader, the prosecutor is more often held accountable for many social problems in the community. The publicly elected prosecutor is most often involved in process of helping to resolve the community problems.[96] There was a time when the prosecutor's job was simply to prosecute. Those days are gone. No longer is the prosecutor responsible for simply prosecuting the domestic violence case; she now helps raise money for the domestic violence shelter. The prosecutor must not simply prosecute the drunk driver, but she must also know of sentencing and treatment options. She must know what alcohol treatments are available and which one are most effective.[97] The prosecutor seeks solutions to the problems and stays in touch with the vast array of counseling services. She participates in task forces, non-profit boards and other associa-

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[93] In the United States, district attorneys were provided for in the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789). The statute, in language in which one may trace an echo of the Connecticut Act of 1704, made provision for the appointment in each district of a "meet person learned in the law to act as attorney for the United States" and made it his duty to "prosecute in each district all delinquents for crimes and offense cognizable under the authority of the United States." *Id.* The role of the prosecutor was, simply put "to prosecute." This was true even until the mid-to-late twentieth century. Perhaps it was sometime around the 1980s that the role of the prosecutor began to change.

[94] Martin H. Belsky, *On Becoming and Being a Prosecutor*, 78 NW. U.L. REV. 1485, 1509 (1984).

[95] *Id.* (citing the National District Attorney Association (NDAA) Standards).

[96] American Prosecutors Research Institute, *supra* note 19.

[97] Zuni-Cruz, *supra* note 5, at 576. Professor Zuni-Cruz provides an in-depth detail of the need for lawyers to understand their clients' communities. She states that knowledge of the community is essential in community lawyering

tions. Typically, the elected prosecutor plays an active role in neighborhood groups and associations.[98]

The prosecutor must administer justice as well as represent the interests of the society and the community in which to she serves. She must be responsive to victims and community needs.[99] The prosecutor must be a proactive community problem solver and must serve not only as the chief law enforcement officer, but must also serve to find insightful and innovative ways in which to deal with social problems *before* law enforcement intervention is required. The prosecutor must have a desire to serve her community, not narrowly focused toward law enforcement, but rather in a multi-dimensional capacity of a community activist and seeker of social justice. Because the role of the prosecutor is much greater than to simply prosecute, the role of the prosecution clinic must also be greater than teaching students to simply prosecute. The clinic experience should parallel the real-life demands.

Prosecution clinics are traditionally not viewed as an avenue for public service or for social justice. However, with the recent social trend toward community-based prosecutions, this view may change. The prosecutor's role is not to simply deter crime by successful convictions, but to also deter crime by means of social programs, addressing the cause of crime, imbalances of power, poverty, racism, hate and other tolerance issues. The prosecution clinic should ground the student in community-based issues as wells as skills and legal training.[100]

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[98] For example, in New Mexico, Kari Brandenburg, the District Attorney for the Second Judicial District sits on the Metropolitan Criminal Justice Coordinating Counsel, participates in neighborhood collations and associations, and is a member of Weed and Seed, a federal funding program to revitalize neighborhoods, project SAFE neighborhood, H.I.D.T.A., D.W.I. task forces, Domestic Violence Task forces, and other proactive community-based problem solving committees. She works with project S.A.N.E. and rape crisis. When she is unavailable to attend, she involves her Deputies and other Assistant District Attorneys. Each Deputy District Attorney is involved in a separate myriad of community-based projects and all individual Assistant District Attorneys are encouraged to participate in community as well as Bar Association activities.

[99] Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935).

[100] In the New Mexico District Attorney Clinic, the student is required to par-

The student prosecutor must learn to collaborate with other professionals and utilize available community resources.

One criticism of the prosecution model is that it does not teach social justice or community based lawyering. The argument that a district attorney clinic is not a public service is flawed. Social justice goes alongside the public service component of the prosecution clinic. At least forty percent of the prosecutions conducted by the students in the District Attorney Clinic are domestic violence cases. These cases have real-live victims who are struggling to make sense of their situations. Many struggle economically. Many do not know of the community resources available to them. Many do not know of, or understand, restraining orders or other legal resources available to the victim. Many victims of crime are members of traditionally underrepresented groups who are very much in need of legal assistance.[101]

Assisting victims is often consistent with public service. Assisting victims of crime takes on a wide range of activities. Assistance can also be as simple as talking to the victim and providing reassurance and support. Assistance can be more complicated. The student prosecutor has the resources to arrange for transportation to and from court, providing telephones,[102] assisting in finding shelter and referring the victim to other legal resources for further assistance. The student prosecutor has the time to develop a relationship with the victim.[103] Counseling and domestic violence programs, shelters for battered women and resources for the family should be a part of the student prosecutor's problem solving and assistance.

For its success and failures, public service serves an impor-

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ticipate in various community activities such as the Domestic Violence Impact Panel, the D.W.I. impact panel and other activities conducive to teaching students broad ramifications of prosecution.

[101] Knight, *supra* note 29, at 866.

[102] The Second Judicial District Attorney's office in Albuquerque, New Mexico has 911-cellular telephone available for victims who fear immediate danger. These phone are lent to victims on request.

[103] All District Attorney's offices in New Mexico have victim assistance advocates to help the student prosecutor obtain resources for the victim. The victim advocates can provide transportation in state owned vehicles.

tant educational value, exposing students to how our justice system functions—or fails to function—for poor people and minorities in our society.[104] This goal is best achieved if such experience is gained during law school, early in one's legal career.[105] There is certainly a need for prosecutors to be sensitive to justice issues and to view their careers in context of the larger picture of "public servant." Along these lines, there is a need for law schools to educate and train future prosecutors in the socio-political dynamics of the community.

Training future prosecutors in these dynamics can be done by supplementing the typical criminal justice curriculum with lectures on important social issues relevant to the community. A major issue in the New Mexico District Attorney Clinic is the multi-cultural environment. Many times, the student prosecutor crosses cultural boundaries in their clinical experience. The student must be made aware of the need to understand the influence of the "entered" culture in order to problem solve.[106]

The University of New Mexico District Attorney Clinic has taken other steps to incorporate socio-political dynamics into the classroom. This clinic has incorporated immigration issues.[107] This raises awareness of the importance of the federal immigration issues and demonstrates how such issues may determine the outcome of the case. In New Mexico, this is a huge social and political dynamic that effects criminal prosecutions. To ignore this dynamic would be negligence, at best.

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[104] Robert E. Precht and Suellyn Scarnecchia, *The Pro Bono Priority: The University of Michigan's Approach to Instilling Public Service,* 80 MICH. B.J. 70, 70 (2001) (requiring students to complete pro bono hours at the University of Michigan).

[105] *Id.*

[106] Zuni-Cruz, *supra* note 5, at 569. Professor Zuni-Cruz discusses the important issue of multi-culturistim as it affects community lawyers.

[107] University of New Mexico Professor Gloria Valencia-Weber frequently guest lectures in the District Attorney Clinic. She provides an intensive one class lecture to introduce the student to the fundamentals of immigration law, specifically designed to educate the prosecutor to potential consequences of cases. While the students could not possibly learn all about immigration law in this lecture, Professor Valencia-Weber makes the student aware of issues and provides resource materials for the student prosecutors. Because Albuquerque is a multi-cultural city, and New Mexico is a border state, immigrations issues arise frequently.

Other supplemental topics that focus on equal access to justice include mental health issues, domestic violence topics, training in working with victims in the community, and awareness of the resources available to the community.

Sometimes, the lessons learned in the District Attorney's office are lessons of how the prosecutor fails to properly serve its community. These lessons can include how over-zealous or ineffective prosecution can obtain results contrary to justice. Lessons can also include insensitivity to racial or cultural differences. A blindness on the part of the student prosecutor can lead to surprising results.

> *In one case, the defendant was charged with eluding a police officer. He had taken the police on a high speed chase through the city of Albuquerque and then into the county. He drove many miles into a rural area, all the time being followed by the police. He endangered many people, almost hit pedestrians, side swiped cars and was generally reckless. The defendant drove up to a home, and ran inside. He locked himself in the home and wouldn't come out.*
>
> *The case was set for a jury trial and the students spent long hours preparing for trial. They had the elements of the case; they prepared their opening and closing and were determined to win.*
>
> *When we got to trial, we, for the first time, met the defendant. He was an elderly, frail gentleman of Hispanic descent. The state's witnesses were four county sheriffs who were all very young, physically fit, light-skinned Caucasian men. The students narrowly focused on the fact that the defendant had violated the ordinance. The students completely ignored the racial underpinnings of the case.*
>
> *Before trial, the faculty supervisor discussed the racial differences in the case. The faculty alerted the students to overtones that could dramatically change a perception of the facts. The students did not think it would matter. The students refused to see how race could affect the facts of the case. They narrowly focused on the legal elements of the case.*
>
> *The jury acquitted the defendant, and the students were bewildered. After the jury was dismissed, the students had the opportunity to talk to the jurors. The students finally made the connection to facts in the case that were never spoken; the*

elderly man was Hispanic and the four sheriffs' officers were young, burley fair-headed Caucasian men. The jury had reasoned that the frail elderly gentleman may have had life experiences that led him to believe that he was not safe stopping for the police on the streets. They reasoned that the elderly man had fears and wanted to be in the safety of his own home. Some jurors reasoned that the police may have been racially biased. The jurors saw a discrepancy in power and control. Had the students fully comprehended the racial and cultural undertones, they may have analyzed the case differently.

The jury also expressed concern that the defendant should not go to jail. The students were surprised that the jurors focused on the consequences of their verdict. There was a specific jury instruction informing the jury not to consider the consequences of their verdict. This was the first time these students had dealt with jury nullification.

In this case, the students learned lessons beyond what they had been taught in the classroom. The students learned of the social concerns of their community and they became more sensitive to social justice issues. They learned that justice can reach beyond the elements of the case.

If the faculty guides the student to reflect on the justice issues, a lesson can have more value. It helps professional development and also raises awareness of the prosecutor as a public servant. Discussion of racial and cultural differences in the community can help the student develop awareness to various constituent needs.

Teaching community justice also trains leaders. The prosecutor is a community leader actively involved in community problem solving on a local, state and, sometimes, a national level. A good prosecutor does not limit her duties to merely "prosecution." The prosecutor must be searching for solutions and options. The prosecutor should be a community leader searching for the common community goal of peace. Likewise, prosecution students should be encouraged to explore their own future role in community problem solving.

Once the student is working in the prosecution clinic, the student has made an investment in the success of the system.

For a person who has always been outside the system, this can be very empowering.[108] Being a part of the criminal justice system generates a personal investment in it.[109] This is a commitment to the entire system, not just to a single case. This can be the beginning of the students' commitment to public service and community justice.

Impacting the Community

The effects of the District Attorney Clinical Program can be far reaching. For those students not ultimately employed by the district attorney, the clinic gives the future lawyer an appreciation of the perils of important community issues, such as driving under the influence and domestic violence. Students choosing a criminal defense practice learn to better negotiate the maze of the District Attorney's office; they learn the inner workings of the office and they learn to understand a prosecutor's reasoning.

The District Attorney Clinic gives the future lawyer an appreciation of the role of the attorney as a protector of the public, and it gives the student a vision of the work of the prosecutor as a public servant. It is not uncommon that a student would create an innovative program idea or want to participate in a community activity on behalf of the district attorney. If structured correctly, the prosecution clinic can be a community-based program that enhances awareness and appreciation of the prosecutor's role as a community leader and public servant.

Conclusion

Clinical legal education should help to make the future lawyer sensitive to the broad issues going beyond the immediate case. It should give him practice in how to make constructive change in justice in the course of his professional work.[110] Clinical education should equip the future lawyer with skills

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[108] Knight, *supra* note 29, at 861.

[109] *Id.* at 862.

[110] Pincus, *supra* note 86, at 83-84.

transferable to the practice of law. This can be achieved in a prosecution clinic. It is the goal of the University of New Mexico District Attorney Clinic to shape and encourage a mastery of trial skills as well as to develop a justice sensitivity on which to practice prosecutions. The prosecution clinic can offer rewarding clinical skill experiences as well as a rich professional beginning.

REFLECTIONS FROM THE JOURNALS OF PROSECUTION CLINIC STUDENTS

William P. Quigley[*]

I. Importance of Journals in Prosecution Clinic

"It wasn't until I sat down to write this journal entry that I truly could appreciate what I had learned this week."[1]

This article contains reflections selected from Fall 2002 semester journals by students in the prosecution clinic at Loyola University New Orleans School of Law.[2] This is not the traditional law review article which looks deeply and analytically into one narrow section of law. Rather, it is my hope that these selections will create a mosaic of reflections which will themselves illustrate the critical importance of weekly student journals in a prosecution clinic.

Before turning to the most interesting part of the article, the student reflections, it is important to put the idea of journals in context. Journals are a time-tested method of encouraging reflection.[3] Because reflection on experience is the core

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[1] Journal entry by MN, Sept. 11, 2002.

[2] Loyola has operated a prosecution clinic for nearly twenty years. Students are regularly placed in the District Attorney Offices of Orleans Parish and in Jefferson Parish. The expectation is that students will spend two semesters in the clinic. The students receive three hours of graded academic credit per semester and are expected to average at least twelve hours of clinical work each week, submit quality weekly journals, and participate in a weekly classroom component.

[3] The premier article on the importance of journals in clinical settings is J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 Clinical L. Rev. 55 (1996). Ogilvy's article details some of the history of the use of jour-

of clinical education, journals are particularly effective.[4]

Outplacement clinics and externships have distinct educational challenges over and above other types of clinical education.[5] Students are typically located off the law school campus and subject to supervision by other lawyers in addition to law school clinical faculty. This calls for creative methods of teaching and learning by clinic students and law school faculty.[6]

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nals in other educational disciplines. *Id.* at 56-59 nn.3-4, 9.

Journals are also useful in cross disciplinary experiences:

> A journal offers writers the opportunity to become participant/observers of their own learning, to describe a significant experience and to then reflect on that experience to see what they can learn from having had it. It offers an opportunity to practice education as making up and changing one's mind.

Mark Weisberg & Jacalyn Duffin, *Evoking The Moral Imagination: Using Stories to Teach Ethics and Professionalism to Nursing, Medical, and Law Students*. CHANGE, Jan. 1995, *available at* 1995 WL 3715077 (detailing the use of journals to help teach ethics and professionalism to nursing, medical, and law students).

Teachers use journals to reflect on their own experiences. *See, e.g.,* Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 1 (1996) (reflecting on a year spent as an Assistant U.S. Attorney).

Other creative teachers use journals to enhance student understanding in classroom subjects. *See, e.g.,* Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2245-48 (1992) (discussing journals in extraordinary teaching experience).

[4] For an enlightening review of one student's clinic journals and the emotions and insights they contain, see Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLIN. L. REV. 299 (1994).

[5] One instructor offers some insight into these challenges:

> [Third-year law students working and learning in a prosecutor office face] significant barriers to careful critical thinking in a fieldwork setting, including career anxiety, naivete, and supervisors or agency culture in which agency attorneys do not, or no longer, question policy or practice assumptions. Third-year students, who often exhibit academic fatigue, are often re-energized by the real world setting of extenship, yet they continue to resist intellectualizing their experience.

Harriet N. Katz, *Using Faculty Tutorials to Foster Externship Students' Critical Reflection*, 5 CLINICAL L. REV. 437, 442 (1999).

For a description of the structural and institutional challenges of a law school prosecution clinic, see Karen Knight, *To Prosecute is Human*, 75 NEB. L. REV. 847 (1996). For a description of the inherent challenges of being a prosecutor, see Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

[6] Several authors think learning in the middle of actual work is the best way

Students who learn in an off-campus setting, with both on-site and on-campus supervisors, must take more independent responsibility for their educational experiences.[7] Faculty supervising off-site clinical students must develop multiple opportunities for feedback and critical reflection in order to compensate for the lack of direct on-campus faculty supervision.[8]

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of learning. *See, e.g.,* Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994).

One group of authors suggests that not only does much learning take place outside of educational institutions, but that it should. Daniel J. Givelber, et al., *Learning Through Work: An Empirical Study of Legal Internship*," 45 J. LEGAL ED. 1 (1995). Surveys of recent law school graduates found that law school educational opportunities actually ranked third, after repeated experience and on the job observation and advice. *Id.* at 17. In fact, law school nearly tied the educational experience from summer clerking, which came in a close fourth. *Id.*

[7] Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Education*, 69 NEB. L. REV. 537, 545 (1990). Maher sees several aspects of outplacement clinical experiences, which others view as potential drawbacks, as opportunities and advantages for law students. Large dockets are more realistic than working on a small number of cases. *Id.* at 544-48. Less supervision and control allows students to assume significant responsibility as they demonstrate competence. *Id.* Stress? That is the real world of lawyering. *Id.*

[8] Harriet N. Katz, *Pedagogy: Using Faculty Tutorials to Foster Externship Students' Critical Reflection*," 5 CLINICAL L. REV. 437 (1999). Katz describes the division of responsibility between on-site and campus supervision as:

> Overall, then, supervising attorneys at the placement provide task and technical supervision, an invaluable real-world context for student experience, and some critical discussion of experience. On-campus supervision by faculty is the main vehicle for identifying students' individualized goals and supporting students' critical reflection on what they have learned.

Id. at 440; *see also* Robert Condlin, *Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. LEGAL ED. 45, 63-73 (1986) (detailing some positive ideas about off-site clinical experiences). Condlin suggests that the on-site supervisor has primary responsibility for the technical quality of the student's work and the clinical professor is tasked with developing policy and contextual analysis. *Id.* at 64-66.

Condlin, as a critic of conventional in-house clinics and a vigorous supporter of off-site clinical experiences, recognizes some of the inherent drawbacks in student learning in offices outside of the law school:

> There are two principal quality control problems with externship instruction. First, it is difficult for externship students to know quickly when they are just practicing mistakes. Supervision is not as continuous as it is in the in-house clinic (the outside supervisor is also a full-time practi-

Thus, for outplacement clinics and externships, journals are essential tools for helping the student and teacher address issues of accountability, critical reflection on experience and pedagogy.

Each third year law student in the Loyola Prosecution Clinic is required to provide a weekly written journal briefly describing what kinds of work they did during the week, the hours they put in and some reflection on their actions.[9] The

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> tioner with other responsibilities), and a great deal of time can pass before mistakes come to light. Second, externship students have a greater tendency to accept supervisor (practitioner) advice uncritically, as received wisdom, than do clinic students. There is no ethos of listening critically, as there is in the clinic, and it is awkward for supervisors to try to prevent this from happening by intentionally criticizing their own actions.

Robert Condlin, *Learning from Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Education*," 3 CLINICAL L. REV. 337, 431 (1997).

[9] After trying both, I have found that weekly journals are much better than journals submitted every two weeks. Because the students are forced to submit journals weekly, I think they reflect more frequently, making the experiences they reflect upon fresher.

These students were not required to address a certain topic in their journals. Their instructions were as follows:

> The journal itself should discuss: the work you performed; your observations about any court appearances and the work of other lawyers, parties and witnesses you observed; ethical issues; how you evaluate the work you have done; and plans for expanding your knowledge and/or improving yourself as an advocate.
>
> A journal can help you in several ways. First, writing will make you reflect on what you have learned in a specific and concrete fashion. Second, your journal will allow me to understand some of what you are learning in your experiences away from Loyola. Third, your journal will give you a record of your progress as a clinic law student.
>
> Your journal should not just be a list of what you have done. Your notations about what time you spent each day will do that. Your journal should go over and above a record of the amount of time you spent and a list of activities you were involved in. Your journal should answer questions. What did I learn about the practice of law and about myself as a lawyer this week? What do I need to learn more about? Your journal should indicate what you are sensing, observing, thinking and feeling about your experiences with clients, the justice system, the lawyers you work with, and the lawyers you oppose. Apart from these guidelines, there are no strict requirements for what should be in your journal.

journals are not distributed to the class without prior permission of the students.[10]

Student journals are a critical part of the educational process in our prosecution clinic. Students are given guidelines for the journal before the semester starts. While I do not respond to every journal submitted by students, I do respond regularly. Most frequently I write back with either compliments for insightful observations and accomplishments, encouragement when the journals express the inevitable disappointment or frustration of trial work, or questions to try to prompt more in depth reflections. Often the journals will be referenced in our weekly class meetings and used as stepping off points for discussion.

I find writing a journal is very useful for most students. Many really take to them and use them to tell me what they have been doing and to reflect on their experiences. Some, as you will see, are outstanding reflections on the practice of law and their own learning process. However, for some students the journals just never seem to click. In my experience, those for whom the journals do not work are far more likely to be among male students than females. Though they do the journals, they give terse dry summaries of what they have done and rarely reflect in a personal or meaningful way. Despite my questions to them trying to provoke more meaningful re-

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> Why journal? Every excellent lawyer consciously and continually learns from their experiences. Excellent lawyers plan what they are going to do before they take action. After they act, they reflect on how their action measured up to their plans. Excellent lawyers ask themselves what worked best, what did not work as well as expected, and what she or he would do differently the next time they were in that situation. This is called self-reflection. As one tool to assist you in becoming more self-reflective you will keep a journal of your experiences as an outplacement clinic student. Writing about your work will give you a chance to reflect on it, and can encourage more thoughtful reflections.

Expectations for Students in Loyola Prosecution Clinic, Fall 2002. (On file with author).

[10] The journal entries quoted in this article are followed by correct dates, but by initials that have been changed in order to shield the student, supervisor, client and judicial identities. In some cases, minor changes have been made to make the entry more understandable.

flections, they are either not comfortable writing, reflecting or sharing.[11]

The journals allow students to give their emotional experiences and reactions to numerous siutations and legal actions, including brutal crimes, police actions and inactions and judges. Additionally, they can reflect on career-oriented aspects of the clinic, such as whether they have received good or bad mentoring, their own sense of what they want to do as lawyers, how they want to act and what type of law they want to practice.

On a personal note, after spending several days re-reading a semester's worth of journals to prepare for this article and reading more of the literature about journals, I have concluded that I can and should do a better job responding. In rereading these reflections to decide whether to use selections for this article, I realize that I missed several key opportunities to respond to the reflections. I usually have no trouble responding to great reflections, but I am less responsive to bad ones, like ones that criticize or display irritation at unrepresented defendants. On the other hand, I want students to be open and honest, so it will be a challenge to figure out exactly how to respond. I also often missed the humor. As a good clinical teacher should do, I resolve to learn from my experiences and try to do better.

II. Reflections from Prosecution Student Journals

In this section of the article, the author is going to try to consciously step back a bit and allow the writings of the students illustrate what journals can do. Each of these selections was picked out of more than a hundred other journal entries

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[11] I noticed I repeatedly asked students who were submitting short unreflective journals: "Tell me some more about you.What are you learning about how to be a good lawyer? What are you learning about what your own strengths and weaknesses are?" That did seem to work for some, but for others, no.

I must admit I have not found an answer for the students who resist doing in-depth journals. I encourage more reflection, but it is rarely forthcoming. I am thinking about being more directive for those students, in part based on the results of my research for this article.

because it struck a chord in this author. That chord might have been surprise, respect, awe or even humor. With any luck, a few will strike similar chords in the reader and you will see the importance of the journal exercise.

A. Compassion for Defendants

It is expected that prosecutors have compassion for the victims of crime.[12] Indeed, compassion is one of the qualities that should guide prosecutors.[13] But in my experience, compassion by prosecutors for defendants is also real, though rarely discussed.[14] The following reflections on defendants were written a month apart by two different students in the prosecution clinic.

> Throughout my research on the case, it was easy to paint a picture in my mind of the defendant as a monster; someone absolutely revolting as being the one to have committed the crime. My actual exposure to this defendant sent my predis-

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[12] "He had great compassion for the people he represented and I see that quality in good prosecutors. They have compassion for victims of crime." *In Profile—Thomas J. Esch*, 33 PROSECUTOR Jan./Feb. 1999, at 13.

[13] JOHN J. DOUGLASS, ETHICAL ISSUES IN PROSECUTION 38 (1988) ("Notwithstanding the aid provided by 'written tablets' handed down from 'on high,' prosecutors must largely rely on their own understanding, integrity and compassion.").

[14] As Mark Baker states:

> Unfortunately, the paranoia that lumps all defendants together as one big smelly animal cancels out the one real power a prosecutor wields: the discretion to offer clemency. Although more and more of their decision making powers are being taken away by statute in many states and the political and media pressure to be "tough on crime" is extremely intense, prosecutors still have the power and the obligation to look at each individual case and decide for themselves if this particular defendant deserves some consideration, some compassion. It is part of their responsibility to see that people don't get trampled unnecessarily by the law. Are there extenuating circumstances in the case? Is crime an anomaly in this person's life? Is the community better served by giving this defendant another chance? Losing sight of the good in people may be the prosecutor's ultimate crime against his profession and the people he serves.

MARK A. BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 48 (1999).

> position about him into total disarray. The defendant is young, clean-cut, and comes from a good family. It is interesting how this may come into play in swaying the jury's decision just merely on outward facts about the defendant.[15]
>
> Another event that touched me today was watching a defendant apologize to the victim on his own accord. No one told the defendant to apologize, he just did. This particular defendant was out on bond. He acted responsibly by showing up for court. He was found guilty, so they handcuffed him and took him away. I felt very sorry for him. He was going away for one year for stealing some shorts from the Athlete's Foot. I felt really bad for him when he asked the judge if he could take his pajamas with him to jail. It was so sad. Even though I know I definitely want to be a criminal prosecutor, I know that sometimes it is going to be hard for me because sometimes I will feel bad for the defendant.[16]

B. Defense Lawyers

Despite media stereotypes about the distance and animosity between prosecutors and criminal defense lawyers, the reality is quite different. For one thing, a large number of the criminal defense bar was once prosecutors and are familiar with the occupational challenges of the prosecution.[17] Secondly, given the large caseloads of current criminal dockets, few prosecutors maintain an antagonistic relationship with the entire defense bar, choosing rather to cooperate on a professional level with appropriate defense counsel.[18]

While there are student journals that discuss the shortcomings of defense counsel they have encountered, these two student reflections show how students who chose to be in a prosecution clinic, rather than a criminal defense clinic, can still learn from the other side.

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[15] Journal entry, BB. Sept. 26, 2002.

[16] Journal entry, TD, Oct. 30, 2002.

[17] PROSECUTORIAL RELATIONSHIPS IN CRIMINAL JUSTICE: ROLES AND FUNCTIONS OF THE PROSECUTOR 67 (John Jay Douglass ed., 1977).

[18] *Id.* at 67-91.

Today, I had the opportunity to truly appreciate the extreme pressure which is placed upon the public defender. This morning during arraignments, she was assigned to represent three or four defendants, and she was running back and forth trying to deal with her other clients as well as represented the new ones. It was apparent she was exhausted and overworked but yet properly and adequately represented her clients. I also must note, however, that even given this environment, she showed such compassion for them and concern for their best interests.[19]

The defendant's attorney was truly masterful in the art of speaking to the jury in order to sway them personally to her side, as well as convey information that would be beneficial for a verdict in the defense's favor. This attorney accomplished this by doing all of the things right that the prosecuting attorney before her did wrong. Most obviously, she spoke to the people sitting in the jury box as if she were having an honest, one-on-one conversation with a singular person. Further establishing a bond between her and the people across from her, she included them in her hypothetical scenarios more naturally by dredging up small bits of information from their personal lives to include in the scenarios, thereby making the hypos more natural in the conversation. When she had to make a flat-out point favorable to her side, she did it cleverly, without beating them over the head with the obviousness of it. This was most evident when she spoke of reasonable doubt, saying, "You consider yourselves reasonable people, right? Well if you honestly doubt some of this evidence, isn't that reasonable doubt?" The effectiveness of this statement was so apparent, that several people in the courtroom reacted audibly with surprise and jubilation by the shrewdness of this revelation.

While her methods to this point were apparently superior, she showed her real genius later when she learned that one of the prospective jurors worked with drug addicts in their medical profession. At which point, the defense attorney began asking questions about the effects that drugs have on

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[19] Journal entry, MN, Sept. 4, 2002.

the memory and actions of people who are under the influence, thereby, unbeknownst to the jury, already beginning to attack the credibility of an upcoming witness who was on heroin when he saw the murder. Although the A.D.A. objected on the grounds that there was no expert witness in this case, the judge allowed this questioning to continue (also noteworthy is that the objection, in my opinion, should have been more along the lines that she was eliciting testimony from a juror or that it was irrelevant for the purposes of voir dire). Regardless, the defense attorney extracted all of the answers she was looking for concerning the effects of drugs on a person's ability to observe and relay pertinent information, and in effect, was already winning the case before it started.

Although I have learned much from the prosecutors I have observed in the courtroom, I never expected to learn so much from a defense attorney about how to conduct a trial as a prosecutor. Ultimately, I have found that sitting in a courtroom and watching a great lawyer at work is above and beyond any instruction I could receive in any other conventional form."[20]

C. Determination and Work of Prosecutors Outside the Courtroom

One of the real strengths of a clinical experience in an on-site prosecution clinic is that students are immersed into the environment of a real working prosecutor's office.[21] Because the prosecution student has quite a bit of in court time, she has the opportunity to see many kinds of behavior by other prosecutors and defense lawyers to either model or reject. But, just as im-

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[20] Journal entry, KK, Oct. 21, 2002.

[21] Givelber states:

> Our data show that second- and third-year law students believe that they learn well from full-time work in law offices. The body of data makes sense in light of what we know about the role of context and collaborative work relationships in training a novice to perform highly skilled activities. It makes sense in light of a student's need to immerse herself in a professional role to develop a professional self and to maximize the satisfactions inherent in authentic performances of complex tasks.

Gilver et al., *supra* note 6, at 43.

portant, if not more so, is the out-of-court time that the prosecution student is in the office. It is in that time that the truest work of trial advocacy takes place—trial preparation. It is the efforts of the student's supervisor and of others in the office that make impressions on the student.

> As much as clinic is about learning to practice the law in the courtroom, it is also about learning the real practice of law, such as dealing with police officers and victims as well as spending hours preparing for cases that are only going to plead anyway. But it's also about learning to pull your own weight, that you are accountable for your actions as well as being responsible in preparing and presenting case at trial. As part of that process, one must accept that even the minor tasks are part of the process of learning how to be an attorney. Spending the day telephoning police officers runs contrary to the glamorous vision of the life of a district attorney that TV programs show. But that is reality. We all know that the law can at times be tedious, difficult, frustrating and even sometimes a little monotonous. Much like a marriage, when you decide to become a lawyer, you have to take the good with the bad. Before you can try a case, you have to do all the background work that is necessary to adequately prepare for trial. It wasn't until I sat down to write this journal entry that I truly could appreciate what I had learned this week.[22]

> After I had already missed my class, I decided to stay late to help work on the docket and await the ruling from the court of appeals. Being there that late at night showed me a whole different side to the office. As I wandered around, you had to wonder whether the attorneys were dedicated or just downright crazy. No matter which theory you subscribe to, you have to admire the love for what they do. They have all been there since the early morning, had a full day of court and were going to be back in less than twelve hours to do it all again. And compound upon that these attorneys are making very little money, have absolutely no perks, and work with very little gratitude for what they do—or at least try to

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[22] Journal entry, MN, September 11, 2002.

> do. I have tremendous respect for all of them. They do the best with the cases they are given and have the drive to be good attorneys despite all the problems with the system in which they work. And of course, being there that late at night was a view into my future when I'm a "real" attorney and not just a clinic student with the luxury of leaving at a set time and with low responsibility.[23]

> After having witnessed the people I work with put in hours not uncommonly until ten o'clock at night and sometimes waking up as early as 4:00 A.M., as well as sometimes trying up to five cases a day or waiting all night for a jury decision, I felt that the endurance of such hardships are also part of the experience working at the D. A.'s Office. So enormous and frequent are these sacrifices that I believe they are half of the lessons learned from the prosecuting experience, even compared to the legal jargon, trial practices, and the criminal justice methodology that also must be absorbed. I had many grueling tasks before me this week, and if I put forth half the effort or made half the sacrifices that my coworkers make so frequently, then I feel that I have advanced in understanding the full implications involved with the job of prosecutor.[24]

D. Humility

Humility is not a word often associated with lawyers, law professors or law students. But humility, as all continual learners are often reminded, is in fact part of the threshold of learning.[25] These three journal entries demonstrate how stu-

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[23] Journal entry, MN, Oct. 21, 2002.

[24] Journal entry, KK, Oct. 24, 2002.

[25] Peter Dormer describes the role of humility in learning as follows:

> [In general there are] "three stages in the intellectuals' sleight of hand when it comes to craft issues. The first is to begin by trying to take the learning of the craft seriously. The second is the realization that learning the craft is going to require much more time (and humility) than first envisaged. The third stage, because their own efforts are, understandably, not very good, is to dismiss the craft element as 'sterile and rule-bound' and claim as more expressive their 'freer' efforts."

dents can really examine themselves and their roles in a critical way.

> For the first time I have some real personal issues with a case. The defendant was found guilty. And, his little girl was there, she was like ten or eleven. And, when we walked out of the court she was screaming at us, like she hated us. And, I don't feel bad for the defendant, but I feel so bad for that little girl. I hope that I never stop feeling bad for the little girls, but I think that if I did this long enough I would. And, that frightens me.[26]

> I did have the opportunity to go to the detective's bureau this week about a matter. It was my first time there. I thought I was in a fairly friendly discussion with one detective, and he was asking me about school. He ended the conversation by saying: "Yeah, I guess pretty soon you'll graduate and have to deal with us 'dumb-ass' detectives." I didn't really know how to take this, so I attempted to cordially laugh it off. I know that the police are not particularly fond of attorneys, but I thought that was kind of a crazy comment to make.[27]

> Today, I also got one of the nicest comments from our investigator, but it made me realize how the attorneys are viewed in the office by the non-attorneys. Bob (our investigator) in introducing me to one of the secretaries, said that I was one of the few people who has gone to law school and has remained a nice person and pleasant to deal with. Then again, it is easy to remain nice and easy to deal with when I'm usually not the one on the line with Judge A. It also made me stop and realize that I need to be constantly aware to check any attitude that I may want to have at the door when I enter the office.[28]

Brett G. Scharffs, *Law As Craft*, 54 VAND. L. REV. 2245, 2323 (2001) (quoting PETER DORMER, THE ART OF THE MAKER: SKILL AND ITS MEANING IN ART, CRAFT AND DESIGN 40 (1994)).

[26] Journal entry, BD, Sept. 19, 2002.

[27] Journal entry, BB, Nov. 7, 2002.

[28] Journal entry, MN, Nov. 20, 2002.

E. Humor

"You can't be a prosecutor unless you have a sense of humor. You need a good sense of humor to survive all the tragedy we see in this business."[29]

Many people use humor to temper the effects of tragedy.[30] The life in criminal court is filled with tragedy. Tragedies of violence, greed, pain, betrayal, conflict, weapons, death, injury, attitude, rage and depression. No surprise the prosecution students are happy to report some humor in their journals.

> Earlier this week in court, a rapper was supposed to be arraigned on a simple robbery charge. Because he is for some reason exempt from the criminal process, he decided not to show. The judge issued a capias for his arrest. Unfortunately, he recalled the capias when his attorney eventually came in and whined about his client's tour schedule. The judge set him for a later date. I hope others in a similar situation would be so fortunate. One of this guy's best known songs is apparently entitled "Back That Ass Up." When the judge reset the date, he admonished the defense attorney that his client "better back his ass into court." If nothing else this section of court is never boring.[31]

> I feel fortunate that all of the police officers in my cases showed up considering that many police officers on that particular Thursday were not present in the courtroom because they were attending a full police funeral for a police dog killed in the line of duty several days earlier (the most unique excuse among many that I have heard over the course of the semester).[32]

> The defense attorney, in a conciliatory tone said, "If I

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[29] *In Profile—Ray Larson*, 37 PROSECUTOR, May/June, 2003, at 26. Ray Larson is Commonwealth Attorney for Fayette County, Kentucky.

[30] "I can only say that such humor is, in my opinion, not just common but essential when people face tragedy and injustice." Kathleen Wait, *Feminist Lawmaking On-Line: The Fivers Domestic Violence Listserve*, 11 J. GENDER SOCIAL POL'Y & LAW 877, 915 (2003) (internal citations omitted).

[31] Journal entry, HU, Oct. 21, 2002.

[32] Journal entry, KK, Nov. 14, 2002.

knew you were a law student, I wouldn't have given you so much shit." I still can't fathom how to react to that.[33]

The other unrepresented defendant accepts the state's plea offer on her petit theft charge. She was caught stealing at Wal-mart. Wal-mart vigorously pursues all their shoplifting cases. She is adjudged guilty, sentenced and finger-printed. Part of her sentence is that she must avoid all area Wal-marts. I know several people who just couldn't live with this sentence. They seem to live for their next visit to Wal-mart. It's like a religion over here. This defendant seems totally nonchalant about the whole thing. Just another day at the office. I look at the file and see that she has a "prior" two months before of shoplifting at J.C. Penney. Talk about irritating.[34]

If you are assigned to Section X, schedule your hours to coincide with days that the court will handle jury trials. Do this not only for experience purposes but also for the free lunch. The free lunch is probably the only perk you get for all the work you do. The Judge loves to order from Pampy's. I personally recommend the barbecue ribs. The sauce is perfect and the mess potential is minimal.[35]

F. Judges

No explanation needed.[36]

The atmosphere of the courts is definitely governed by the attitude of the judges. Judges live by their own rules—ones that are not completely fair!!!While I think that some of the rulings that the judge in my court, Section X, makes are absurd, at least he is nice enough and doesn't talk to/treat people like slaves/inferiors/dirt. Not so in Section Y. That judge should be disciplined. He was so rude to the attorneys. He was constantly yelling for the forty-five minutes

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[33] Journal entry, HU, Aug. 30, 2002.
[34] Journal entry, MZ, June 5, 2002.
[35] Journal entry, HU, Dec. 6, 2002, part of Letter to Successor in Clinic.
[36] Names deleted to protect the teacher.

that I was there. I was physically sick watching that judge. Section X is a bit unorganized but pretty mellow. Section Y is extremely tense and suffocating. Thank goodness that I am assigned to Section X.[37]

G. Jury Selection

What trial lawyer or clinic professor has not been educated by answers in jury selection? These two students found insights from jury selections in New Orleans.

> On Tuesday I observed a well-executed voir dire conducted by RJ. He skillfully interwove the elements and facts of the case into his questions in a conversational manner. He made a most complex process appear deceptively simple.
>
> At one point he asked the panel members if they had any relatives that were victims of violent crimes. I was awestruck to hear that about half of the prospective jurors had family members that were murdered. I've seen the horrendous murder statistics concerning New Orleans, but they don't have the same effect as hearing nine of eighteen randomly selected people recount their tragedies.[38]

> As I listened to some of the prospective juror's responses to voir dire questions, I was reminded of the different perspective I have from some of the members of jury pool. Having grown up in suburbia, I believe that one of my goals from my experience at the Orleans DA office will be to learn to see the case from the perspective of a juror and remove my own perceptions and prejudices from my presentation of the evidence and case. I know this is something I will most likely struggle with during this year but that it is a skill I need to acquire.[39]

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[37] Journal entry, TD, Oct. 22, 2002.
[38] Journal entry, HS, Oct. 10, 2002.
[39] Journal entry, MN, Sept. 4, 2002.

H. Learning from Mistakes

"I have children and I teach them to learn from their mistakes. To what extent do prosecutors, federal prosecutors in particular, learn from their mistakes?"[40]

Given all the mistakes that are made by students and professors, it would be great to think that we learn from all our mistakes. But, in fact, we learn from some and repeat others. Here, one student makes a mistake and is upset not because of the mistake, but because of its impact on a respected supervisor. The second student is really reflective, because there were no objective outward consequences for his mistake, just his own sense of value.

> Tuesday was a pretty upsetting day for me. I told K that I would write a writ for him. And, I got the dates wrong. Which is absolutely all my fault. Over lunch I brought the subject up, because I thought the transcript was in, and I wanted to get started on it. But, I was told that the deadline was long gone. He told me that I disappointed him. I was devastated. I would've preferred if he had yelled at me or called me an idiot. I really admire K, and its important to me what he thinks of me. That's the worst thing he could've told me. I'm so mad at myself, because it is all my fault.[41]

> Judge E deferred the ruling pending the defendant's performance during drug court or active probation. As I thanked my officers outside of the courtroom, the defendant walked out with the most smug expression and arrogant swagger. Unbeknownst to him, the officers hung around to arrest him on other outstanding warrants. The defendant's demeanor transformed instantly as the officers cuffed him. The officers conducted the arrest with an air of joviality and I had to suppress the urge to snicker. To this day, I am unable to ascertain why I had this reaction, which after the fact, felt really inappropriate.[42]

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[40] Bruce Green et al., *Panel Discussion: The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 FORDHAM URBAN L.J. 737, 757 (1999).

[41] Journal entry, BD, Aug. 29, 2002.

[42] Journal entry, HU, Sept. 21, 2002.

I. Questioning the System

Questions and critical reflections on the criminal justice system are extremely important for law students, since this is often the first and the freshest look they will have at how the system operates. They may lose that critical perspective once they become more accustomed to their place in the system.[43] Questions about the assembly line of plea bargaining,[44] the different treatment and definition of certain crimes,[45] the way people get depersonalized,[46] all come forth in criminal court.

All clinical students experience "disorienting moments" when events occur around them that challenge their understanding of the legal world.[47] Journals ought to capture some

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[43] Third-year law students working and learning in a prosecutor office face "significant barriers to careful critical thinking in a fieldwork setting, including career anxiety, naivete, and supervisors or agency culture in which agency attorneys do not, or no longer, questions policy or practice assumptions." Katz, *supra* note 5, at 442.

[44]

> "[W]e must all recognize that the United States Supreme Court, in the case of *Santobello v New York*, 404 U.S. 257 (1971), legitimized that bastard child of the criminal justice system known as 'plea bargaining.' . . . Plain and simple, the marketplace has come to the courtroom. The game of numbers and the necessity to maintain effective court dockets have caused our prosecutors to bargain for reduction of charges and to negotiate for terms and conditions of sentence.

DOUGLASS ed., *supra* note 17, at 80.

[45] For some examples of many critiques of disparate treatment in the criminal justice system, see Robert H. Humphrey, *Domestic Violence; Detection, Prosecution and Defense,* 51 R.I.B.J., Jan./Feb. 2003, at 5; Gregory D. Smith, *Disparate Impact of Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the Erie Railroad into the Major Crimes Act*, 27 HAMLINE L. REV. 483 (2004); Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective*, 2 WHITTIER J. CHILD & FAM. ADVOC. 97 (2003).

[46] Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 934-94 (2001).

[47] Fran Quigley describes this learning process as follows:

> Adult learning theory maintains that when a learner begins describing an experience with the phrase, "I just couldn't believe it when I saw . . . .," an opportunity for significant learning has been opened. This phenomenon is called the "disorienting moment," when the learner con-

those moments. These journal entries do.

> As one final passing observation today, I truly saw the law as a business this morning. Over the past two years in my classes, some of my professors have used that term but it wasn't until today that I truly understood what that could mean in practice.
>
> Towards the end of the proceedings this morning, the public defender had lined up three defendants she was representing all of which had been arraigned that morning. The judge went down the line, accepting their guilty pleas and going through the plea colloquy with each defendant. But that's not to say that they did not receive good representation or a fair disposition of their case. However, as I watched the defendants in the line, there was some element that the courtroom was more of a fast food process rather than the idealistic notions which television and movies place in our head. I saw the public defenders, assistant district attorneys and judges as providing a service where the goal is to dispose of the cases as quickly as possible while still effectuating justice. Every player has a role to help the business run efficiently.[48]

> On Tuesday it struck me that the majority of time spentin court is devoted to scheduling things for later dates. I realize now that the criminal justice system is, in the truest sense, a system.[49]

> Thursday I was supposed to do motions, but they all got continued. Today I was supposed to go to trial and do voir dire, but the defendant never showed up. I am learning that you must have patience when dealing with the court system.

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fronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner's prior understanding—referred to in learning theory as "meaning schemes"—of how the world works.

Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 51-52 (1995):

[48] Journal entry, MN, Sept. 4, 2002.

[49] Journal entry, HU, Sept. 12, 2002.

But, it is a very hard lesson to learn.[50]

I learned that the Louisiana legislature thinks that anything but normal man/woman sex is unnatural. Solicitation for crimes against nature is more severe than prostitution. Crimes against nature includes oral sex. So if someone offers oral sex for money and someone else offers "regular" sex for money, the one offering oral sex will be punished harsher than the other one offering "regular" sex if convicted. This is archaic thinking to me.[51]

The reality of being a prosecutor hit me today. The murder trial that I was involved in finished and a verdict of guilty came back. That in itself does not really bother me. After reading the file and hearing the defendant admit his actions, I know that a killer has been taken off of the streets. However, this case has made me realize my fears of becoming a prosecutor. I have always been concerned that in my path to prosecuting that I may have to do things that I either didn't feel comfortable with or didn't feel 100% sure that I was personally doing the right thing. Let me just say again that there was nothing like that in this murder trial. This trial has just made me understand that my job as a prosecutor will not be to put nameless, faceless defendant number 739E in jail. As a prosecutor I hold the balance of someone's life in my hands. What I choose to do and who I choose to prosecute (when I am finally allowed to exercise prosecutorial discretion) is a big deal. I guess that while I realized what the job was and what it entailed I could never understand the magnitude of power and responsibility that will be handed over to me as a twenty-five year old "kid" who just passed the bar until now.[52]

This week has had the greatest impact on my view of the legal profession since I started working at the DA's office. One of the first journals that I composed, I wrote about the inherent problem with being able to separate personal feel-

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[50] Journal entry, BD, Oct. 17, 2002.
[51] Journal entry, TD, Oct. 30, 2002.
[52] Journal entry, Sept. 19, 2002.

ings from the work at hand, and not allow it to influence the work at hand. Today, we began a trial for aggravated sexual battery. It was the story of a step-father who abused his step-daughter from the time she was seven. It was heartbreaking to hear the victim testify. Beyond this, there are three specific things about the trial that made the greatest impressions on me.

First, although I have seen quite a few trials at this point, most of the cases are dealing with drugs (simple possession, or with intent to distribute). This was the first truly "controversial" case I have seen, and it astounded me that the victim was sitting not ten feet away from the defendant. One minute was a moment of great emotion on the stand, and the next, the victim was sitting right next to me talking about the weather. Perhaps it is my remaining perception from TV shows, that a trial is more isolated—more controlled. I simply could not help feeling uneasy at the situation. I felt so uncomfortable, as if I was the one that should feel embarrassed or scared, although I could not really determine why I felt this. I really had to remind myself that I was just there to do a job, and then I felt fine, until something else that was said would make me cringe.

Second, I have spent two years in law school reading many non-sensical judicial rulings. Today, I saw the non-sensical process in action. The defense attorney proceeded to ask a question that is strictly prohibited by the code of evidence. This was swiftly followed by an objection by the State, and this began a confusing process where it seemed that the judge actually took his attention away from the solitaire game on his computer and decided to pay attention. The judge then ignored the code of evidence and allowed the question. However, it was funny-the defense attorney knew that he should not have asked the question, and he voluntarily decided to tone down the substance of the question. Why would the judge do this?I know that this is why there is an appeals process, but it still made no sense to see this happen.

Third, because it is a sex offense, identification of the defendant's genital area was vital to the case. To do this, there was a large color photograph of the defendant's genital area that was almost "freely" circulated throughout the courtroom. I know that this was the process, and it was necessary

for the case — it was still shocking that it was passed around so easily especially considering that the trial is technically open to the public. But then, does a defendant have any reasonable expectation of privacy, or protection for their dignity?

Fictional television shows expose us to many topics that we find shocking today, but we are aware that those scenarios stay in the fictional world. This case and the events that transpired were a wake-up call—perhaps my first exposure to the vile life that some people live, and the fear and anguish that a victim holds inside. Today was real . . . "[53]

J. Race

I was a Special Assistant United States Attorney in the District of Columbia in 1990. I prosecuted people accused of misdemeanor crimes, mainly the drug and gun cases that overwhelm the local courts of most American cities. As a federal prosecutor, I represented the United States of America and used that power to put people, mainly African-American men, in prison. I am also an African-American man. While at the U.S. Attorney's office, I made two discoveries that profoundly changed the way I viewed my work as a prosecutor and my responsibilities as a black person.

The first discovery occurred during a training session for new Assistants conducted by experienced prosecutors. We rookies were informed that we would lose many of our cases, despite having persuaded a jury beyond a reasonable doubt that the defendant was guilty. We would lose because some black jurors would refuse to convict black defendants who they knew were guilty.

The second discovery was related to the first, but was even more unsettling. It occurred during the trial of Marion Barry, then the second-term mayor of the District of Columbia. Barry was being prosecuted by my office for drug possession and perjury. I learned, to my surprise, that some of my fellow African-American prosecutors hoped that the mayor would be acquitted, despite the fact that he was obviously guilty of at least one of the charges—he had smoked cocaine

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[53] Journal entry, BB, Oct. 17, 2002.

> on FBI videotape. These black prosecutors wanted their office to lose its case because they believed that the prosecution of Barry was racist.[54]
>
> When it comes to juries, DAs in Sacramento know they're lucky. The jury pool-potential jurors are taken from drivers' license numbers-is solid in California's capital. The county is a healthy mix of urban and suburban. Jurors are pulled from the full county. It's not like downtown L. A. or Washington, D.C., where minorities dominate the pool and you're stuck with a lot of people inherently suspicious of a criminal justice system still run by white people who arrest, prosecute, and judge minorities."[55]

The issues of race and crime are intertwined.[56] This is revealed every day in most criminal courts, certainly in this area of the country. Race comes to the fore often in the case of views about the police[57] and the actions and inactions of juries.[58]

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[54] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678 (1995).

[55] GARY DELSOHN, THE PROSECUTORS: A YEAR IN THE LIFE OF A DISTRICT ATTORNEY'S OFFICE 51 (2003).

[56] RANDALL KENNEDY, RACE CRIME AND THE LAW (1997). See Chapters "Playing the Race Card in a Criminal Trial," "Race, Law, and Punishment: the Death Penalty," and "Race, Law, and Punishment: The War on Drugs." *Id.* at 256-387.

[57] For example, are higher arrests for crack use versus cocaine use based on race or class? William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1796 (1998); *see also* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1266-70 (1994).

[58] Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*." 78 CHI. KENT L. REV. 997 (2003). This fascinating article concludes:

> Our review suggests that White jurors are indeed influenced by a defendant's race, but this influence is not consistent across cases. Contrary to common assumption,obviously racially charged trials may not be the ones in which racial bias is most likely. Psychological research and theory suggest that White juror bias may be a more serious concern in run-of-the-mill cases when racial issues are not salient and White jurors are not alerted to the need to guard against prejudice. In the few studies that have included enough Black jurors to allow for meaningful statistical comparisons by juror race, adifferent pattern emerges. Black

I was somewhat surprised by the views of the police officers by the community. J asked the prospective jurors how do they rate the New Orleans Police Departmenton a scale of 1-10. The African American prospective jurors tended to rate the police officers lower than the Caucasian members of the panel. Also, when the defense attorney asked the members of the panel whether they believed that police officers lie and may even lie to protect a fellow officer, there was an audible response from the panel as well as from other prospective jurors seated in the courtroom. Not one juror responded they believed that a police officer would not lie to protect a fellow officer.

I became mindful of how race can unfortunately sometimes become an element in cases completely unrelated to that issue. The juror's opinions of police officers and race can go to the heart of the state's case regarding possible tactical decisions made during trial. Here, the state presented two white police officers in trial against a black defendant. Both J and I were mindful of this fact when deciding how many officers to place on the stand to prevent the image that the state was ganging up on this defendant.[59]

The verdict was an interesting story in itself —to me, this case clearly appeared as an example of how race can impact divisions between jury members. The defendant was a young black male with potential gang affiliation. The jury was composed of ten young to old white women, and two middle-aged black men. The evidence (including DNA evidence) and testimony were clearly against the defendant, however, the two black men on the jury were still the only two not-guilty votes. I know many have asked the same question, but will race ever stop being an issue????[60]

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mock jurors seem to be influenced by a defendant's race regardless of the salience of racial issues at trial, suggesting that additional theory and research is needed in order to better predict the motivations and judgments of minority jurors.

Id. at 1029-30.

[59] Journal entry, MN, Sept. 4, 2002.

[60] Journal entry, BB, Oct. 24, 2002.

K. Victims

The role of the victim in the criminal justice system is growing but still relatively new.[61] In a 1982 book, *The Prosecution Function*, the authors have a chapter on ethical considerations that has subsections for "Obligation to the Defendant," 'Obligation to the Criminal-Justice System," and "Duty to the Public."[62] The victim is not mentioned in the entire chapter. In fact, there is not even an entry for victim in the index of the entire book.

Yet over the past few decades, there has been an explosion of interest in trying to allow the victim to reclaim a place in the criminal process.[63] Prosecution offices are trying to be more sensitive to the needs of victims.[64] These journal entries show

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[61] Stacy Caplow describes the role of the victim in one setting as follows:

> In New York City, on any given day, there are close to 2,000 lawyers prosecuting cases in the state courts of five counties. Many of them are no more than three years out of law school. If my own experience is representative, no one seriously teaches them how to relate to crime victims. This is not to suggest that all or even most ADAs are insensitive, abusive, or callous in their treatment of crime victims. However, the very nature of their authority, their power, and their ability to control often makes this relationship invisible and beyond critique. Moreover, since young prosecutors usually learn their styles and attitudes from more senior role models in the office who have internalized this power, bad habits often are passed along to the next generation.

Stacy Caplow, *What If There Is No Client? Prosecutors as "Counsellors" of Crime Victims*, 5 CLINICAL L. REV. 1, 16 n.47 (1998).

[62] DAVID M. NISSMAN & ED HAGEN, THE PROSECUTION FUNCTION 7-12 (1982).

[63] *See generally* Caplow, *supra* note 61. Caplow gives a great discussion about the new role of victims and new ways that prosecutors can develop a victim-sensitive, if not victim-centered, criminal prosecution practice.

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> [M]ore often than not a victim's reaction to the disposition of a case has less to do with the number of years of penitentiary time the defendant receives than the level and quality of interaction with the prosecutor or victim advocate throughout the process. Unless the prosecutor's office is committed to effective staff training, this important lesson can go unlearned. Victims are re-traumatized, this time by the system, and the healing process for the victim deteriorates, as does the prosecutor's relationship with the community.

THE PROSECUTOR'S DESKBOOK: ETHICAL ISSUES AND EMERGING ROLES FOR 21ST CENTURY PROSECUTORS 410 (1977).

the impact of victims on prosecution students.

> Today I sat in on a meeting with T, my prosecutor, interviewing a witness. She described, with a shaky voice, how a man in a car had ran over and killed one of her friends. It occurred to me that T was doing much more than reconfirming the information written in the police report. She spent much more time comforting and explaining the trial process to the witness than she did asking her questions about the night. Being engrossed in the process of law, specifically criminal prosecution, might make one forget about the compassion needed by people who are frightened of the enormity and consequences of the process of testifying in a trial. T definitely has not succumbed to taking these people for granted, as witnessed by her gentle reassurance and offers to help in any way she could of this witness, from offering her transportation, to offering to let her come watch another trial, to telling her that she could call at any time, to finally letting this witness know how important she is and how brave she will have to be to aid the process of justice.[65]

> J L was out of our section today trying a murder case in Section Z. She had asked me to call a victim who lives out of state to update her on the status of the case and check on her availability for trial. And of course, while I had her on the phone, talk to her about the case. Although this seemed like a simple request, it proved to be a phone call that I believe I will remember for quite a long time. The victim had been visiting New Orleans with a friend of hers around Memorial Day this year. As they were walking down the street, they were run over by an individual in a truck who "went crazy." According to the victim, the defendant in the case exhibited no remorse as he ran over them and dragged one of the women six to seven feet under the car until she came to rest in the middle of the street. She died later on that evening as did her four-month old son who the victim I spoke with had been pushing in the stroller.

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[65] Journal entry, KK, Sept. 9, 2002.

It's so easy to read a police report and think academically about the people, places and things contained within. But it's another to hear a sobbing victim, angry at the law and the defendant, telling her story to you on the phone, trying to come to grips with the loss of her dear friend and her own injuries.

I consider myself to be a fairly empathic person, but it was such a difficult phone call. I can read the report and look at the photos and video but I cannot even begin to comprehend what she went through that day. Something she said to me on the phone stuck in my head and it's because she's right. What sense of justice is it when the man that ran over and killed her friend and a child is walking the streets?It was so frustrating to not have an answer for her because I hadn't read enough of the file to understand why he was only charged with lesser charges. But I highly doubt any explanation I would have offered her would have been sufficient. And every ounce of me wanted to reassure her on the phone that we would make sure he paid for what he did and that her friend's death would not have been in vain. But I knew better. The last thing I wanted to do was promise her something that I know we may not be able to accomplish. I hope that she realized I was sincere that we were going to work hard and do our best and hopefully we will get a favorable result.

After I hung up the phone, I went to go talk to my junior ADA about the phone call. As I was sitting there, I realized that it will never get easier because it will always be someone's brother, sister, mother, father, friend.

I remember J telling me how much she dreaded calling the rape victim last week after they found him not guilty. I can't imagine being the one that would have to telephone this victim the day after trial if we would lose. I now understand why attorneys take their cases so personally. I know that one day I may reach that point where I can disconnect the emotion somewhat. But I can see this case being one of those cases where you don't want to lose sight of that emotional aspect because it is such a horrible crime. With time, I will

learn what to say and how to react but I know it will not be an easy road getting there. But that's not such a bad thing. I have already gotten so much out of this experience and every day that I'm there it only furthers my resolve that I have chosen the right career path, no matter what side of the fence I may end up on.[66]

III. CONCLUSION

[L]aw school, I believe, primarily *trains* students to listen, think and talk the way that law school prefers. Then what is the law school's *educational* function? To drive you so mad with its incessant drill that you decide to educate yourself. The process appears terribly wasteful, yet some do get educated. If the teacher had a big stick and hit you over the head every time you tried to get him to educate you, the thing would be done in less than a semester. It seems to me that this is the Zen Method of education, so of course I can't claim to have invented it.[67]

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[66] Journal entry, MN, Oct. 23, 2002.

[67] Donald A. Schon, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 250 (1995). Schon says that students must first learn by doing-in order to know what it is that they are doing. Second, students begin to do it in the presence of a senior practitioner who is good at doing it and whose business it is to help you try to learn how to do it. Third, students do it with others who are also trying to learn how to do it. Fourth, you re-do it in the virtual world of theory, of rehearsal, of practice, or of drafting. *Id.* at 248

> In the best educational settings, Schon finds there is: a profound sense of mystery. This feeling resulted from the fact that the students literally do not know what they were doing, and their teachers could not tell them—because what the teachers knew how to say the students could not at that point in their experience understand. The students had to have the kind of experience of trying to do the thing before they would be ready to understand the kind of explanations that the teachers could give them about what they were doing.
>
> One consequence of this is that some of the students pick up the idea that these infuriating teachers will never tell them-that somehow they will have to find out for themselves. They are right, and their insight is absolutely critical: they do have to educate themsevles in this new context.

Id. at 249.

Clinical education, when done well, is about self-learning, figuring out how to keep learning from experience. These journal selections of students in a prosecution clinic illustrate how journals can be one way that students can continue to learn about themselves, continue to reflect on what they are experiencing, and to continually determine where they are on the never-ending path to self-learning.[68]

[68] Journals also help instructors learn more about the practice of law, about their students and, occasionally, about themselves. Consider one final selection from a student journal. While it might also appear self-serving, I think that it does show some humor and also shows how closely the students are watching us. During the semester in question I traveled to Iraq as a part of a peace delegation with the group Voices in the Wilderness, http://www.vitw.org. One prosecution student wrote me in his journal: "I hope all goes well in Iraq. I must admit, it is a noble and most courageous endeavor. If nothing else, it proves that your posters of Ghandi and MLK aren't merely office decor." Journal entry, HU, Sept. 21, 2002.

DESIGNING A HYBRID DOMESTIC VIOLENCE PROSECUTION CLINIC:

Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices

Mary A. Lynch[*]

Broken nose. Loose teeth. Cracked ribs. Broken finger. Black eyes. I don't know how many; I once had two at the same time, one fading, the other new. Shoulders, elbows, knees, wrists. Stitches in my mouth. Stitches on my chin. A ruptured eardrum. Burns. Cigarettes on my arms and legs. Thumped me, kicked me, pushed me, burned me. He butted me with his head. He held me still and butted me; I couldn't believe it. He dragged me around the house by my clothes and by my hair. He kicked me up and he kicked me down the stairs. Bruised me, scalded me, threatened me. For seventeen years. Hit me, thumped me, raped me. Seventeen years.[1]

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[*] Clinical Professor of Law, Albany Law School (ALS), Co-Director, ALS Clinical Program. I am grateful to the following people for their invaluable insights and assistance to me in writing this article: Peter Joy, Rudy Stegemoeller and my colleagues at the ALS clinic especially Melissa L. Breger, Nancy M. Maurer, and Jennifer Tromblee, Adjunct Professors Carmello Laquidara and Lyn Murphy, and former clinic students, Lynn Welthy and A.J. Vickey, who also served as a brilliant research assistant. Thank you also to Stacy Caplow, Larry Cunningham, Vanessa Merton, Michael Millemann, Peggy Tonon and other clinicians who teach prosecution clinics and generously shared information with me about their clinics.

[1] RODDY DOYLE, THE WOMAN WHO WALKED INTO DOORS 175-76 (1996). Se-

In the clinical education universe, the prosecutorial cohort is small. While there may be only a few of us directly teaching and supervising students in this context, every year our former students pour into prosecutors' offices where they receive little reinforcement for a victim-centered approach.[2]

Despite a thicket of progressive policies and good intentions, the prosecution and punishment of domestic violence crimes remains a haphazard affair in jurisdictions across the nation . . . .[3]

I. INTRODUCTION

These three introductory quotes were published during the period 1996-1998 and describe the realities of many battered women, of many clinical teachers and of most prosecutions of domestic violence crimes both then and now. The idea of creating a clinical course at Albany Law School (ALS) focused on domestic violence prosecution was similarly born from: the concerns of battered women, the opportunity to teach students in an integrated, active manner on issues relevant to their eventual practice, and the "haphazard" handling of domestic violence crimes locally. As feminists often note, "*the personal is political.*"[4] Thus, the story of the creation of

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lected excerpts from this fictional work are also found in the textbook, Battered Women and the Law. *See* CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 68-74 (2001). I think those of us in the domestic violence field are amazed that some of Doyle's writing so eloquently mirrors the words and experiences of clients, victims and other women we have known. Thus, I have chosen to use this fictional work instead of similar phrasing from an actual person.

[2] Stacy Caplow, *What if There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 44 (1998).

[3] Allison Frankel, *Domestic Disaster*, AM. LAW., June 1996, at 55.

[4] This quotation was originally used to communicate that the social and legal distinction between public matters and private matters was both false and sexist. *See* WMST-L, *"The Personal is Political": Origins of the Phrase*, *at* http://research.umbc.edu/~korenman/wmst/pisp.html (last visited Apr. 6, 2005); Amy Richards, *What Does the 1960 Feminist Phrase "The Personal Is Political Mean?"*, *at* http://www.feminist.com/askamy/feminism/fem/53.html (last visited Jan. 4, 2005). It

the ALS Domestic Violence Prosecution Unit and my personal experience in facilitating its creation may offer political lessons for others. In addition, although some of the questions, issues and institutions which affected the development of my program are specific to my situation, there is a universal need to analyze the effect of political institutions and systems, educational choices and human actors on the creation and design of any "hybrid" prosecution clinic.[5]

The fall of 1997 was my first time teaching a "Domestic Violence Seminar" outside of my teaching in our in-house clinic.[6] Having just completed four years in our clinic's post-

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has been used more expansively since then to also communicate the false nature of the subjective/objective distinctions made in law and reasoning which traditionally elevate "objective" analysis over "subjective" analysis. Feminist legal scholars have objected on similar grounds to this distinction as well. *See* Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1374-76 (1986).

[5] Clinical scholars have used the term "hybrid" clinic to describe a variety of programs. Some use it to describe the combination of a large traditional course with a clinical infusion of students, cases and faculty which create the basis for exploration of the legal subject matter—the combination of both traditional and clinical so that "teachers and students continually use practice to criticize ethics theory and ethics theory to inform practice." David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 64 (1995); *see also* Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals,* 39 WM. & MARY L. REV. 457, 469-75 (1998). Others have used it in the immigration context to mean a program which combines asylum/immigration law with human rights practice. *See* Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 530-35 (2004); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 534-38 (2003). Still others use hybrid to mean "any clinical program in which law students receive at least some of their case supervision from law faculty." Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 817 n.5 (2004). For purposes of this article, I define "hybrid" as a "combination of the in-house and externship clinic models." *Id.* (citing Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave,* 7 CLINICAL L. REV. 1, 28 (2000)).

[6] This traditional seminar was first taught in 1987 by Albany Law School Professor Kathy Katz and has continued every year since. When I met Professor Nancy K.P. Lemon, author of one of the first law textbooks on Domestic Violence and Lecturer at the University of California, Boalt Hall School, she speculated that the course may have been the first of its kind in the country. *But see*

conviction project in which students and I represented incarcerated battered women who killed their abusers, it was exciting to take both the knowledge and the lessons learned in clinical teaching and sow them into the syllabus, discussion and format of my seminar class.[7] During the semester, many students in the class disclosed and used their personal, academic or professional experiences to enhance class discussion and to broaden perspectives. Despite the plethora of reading and class discussion addressing cultural myths, one seminar student asked over and over "Why doesn't she leave?" or would announce "I just can't understand why she puts up with it." The student, who was enrolled in our District Attorney field placement course, exploded one day with anger about the "ignorant" level of the class discussions critiquing the criminal justice response to domestic violence. *He* knew the real world perspective from his five week experience in Albany city police court.[8] He and his field supervisor were not going to let "these

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Mithra Merryman, *A Survey of Domestic Violence Programs in Legal Education*, 28 NEW ENG. L. REV. 383, 384 n.3 (1993) (citing that in 1993, only one school, Miami University, offered a domestic violence seminar each year). In 1997, Professor Katz honored me with the offer to take over the teaching of this seminar.

[7] For most of 1993 to 1997, the Domestic Violence Project consisted of a family court unit and a post-conviction unit. Students in the post-conviction unit represented incarcerated battered women on clemency matters, state post-conviction motions, habeas corpus petitions and/or parole appeals. Since the early 1990s, several Albany Law School clinical faculty have taught two credit seminars which are co- or pre-requisites to clinical courses. These seminars are open to all students, but are required for those in particular clinics. Thus, although I had taught a post-conviction seminar, my teaching of domestic violence law had been restricted to the "class component" of our post-conviction project. For a good listing of domestic violence law courses and programs across the country, see the recent American Bar Association Commission on Domestic Violence report entitled, *Teach Your Students Well: Incorporating Domestic Violence Into Law School Curricula–A Law School Report*, *available at* http://www.abanet.org/domviol/teachyourstudents.pdf (last visited Apr. 6, 2005); *see also* Joel Landau, *Domestic Violence Courses Flourish: A Recognition of a 'Dire Need' for Courses*, NAT'L L. J., July 5, 2004, at 4 (detailing that 185 law schools now offer courses in domestic violence, which is up from fifty seven schools in 1997).

[8] In Albany City police court, scores of domestic violence criminal cases are "processed" each day. *See* DAVID HEILBRONER, ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A. (1990) (describing an analogous procedure of "processing" in New York County). "The speed of the proceedings in calendar also kept me per-

women" determine what happens on these cases. Prosecutors were *not* victim's lawyers. They would do the *right thing*.[9]

This outburst presented a wonderful teaching opportunity both for my seminar[10] and for the field placement program.[11] At the same time, my "inner clinical teacher" was smiling. How ironic it was that I was being perceived as the academic who had no idea how the real world operated.[12]

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petually off balance. Each of the two to three hundred cases we handled every day received about a minute and a half of court time." *Id.* at 24-26.

The lack of attention and resources to the Albany court and to domestic violence cases—so that the court resembled more of a dysfunctional factory than a community court—was an argument used by David Soares, who defeated the incumbent District Attorney by arguing for more community involvement and better attention to domestic violence. *See* Michele Morgan Bolton, *Domestic Violence Issue Rises in DA Race*, TIMES UNION, Aug. 13, 2004, at B4 (criticizing the then-District Attorney for not applying for federal domestic violence grants), *available at* 2004 WL 8857219. These problems with the court and the lack of prosecutorial resources was the impetus for the Albany County Coalition Against Domestic Violence's Judicial Services Committee to apply for federal funding for resources to create and better staff a domestic violence court. *See* description *infra* Part IV.D.

[9] This second year student had made known his desire to be an assistant district attorney upon graduation. Although this student's presentation was extreme, his thinking was representative of one type of "would-be prosecutor."

[10] I will add that in-house clinical students contributed greatly to the discussion which followed. Also, in future years, I completely re-organized the seminar to make sure inspiring advocates, such as Karla DiGirolamo, and articulate survivors were featured as guest lecturers early on in the course. From 1981 to 1989, Ms. Digirolamo coordinated domestic violence taskforces and commissions in New York State which led to New York's early efforts to implement legislative reform, secure funding for emergency shelters, advocacy programs and community outreach initiatives and provide training programs for police and health care professionals. The first Executive Director of the NYS Office for the Prevention of Domestic Violence, a cabinet member position under Governor Mario Cuomo, Ms. Digirolamo has testified before Congress, lectured nationally, provided consultation to national and international organizations addressing domestic violence issues and testified as an expert witness in Massachusetts and New York.

[11] I was able to discuss this event and the need for more "institutional critique" with the director of the field placement program who oversees the adjunct and field supervisors and meets twice a semester with students. *See infra* note 60.

[12] Prior to my, at that time, eight years of work in the Albany Law Clinic, I had worked for four years as a prosecutor in New York County. The Christmas before this incident the clinic had been successful in a widely publicized case, in obtaining clemency for an incarcerated battered woman who killed her abuser.

What this student needed was a "disorienting moment"[13] so that he could examine in a more theoretical manner the preconceived notions of his field placement supervisor and critique the existing legal system.[14] I also was feeling a little homesick for the in-house clinic. In-house clinics provide such fertile ground for integrating theory, law, reality, practice and disorienting moments.[15] Classroom discussions can lead to

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Thus, I was known to the students as the "feminist" defender of battered women killers and not as a former prosecutor. Also, there are some upstate-conservative/downstate-liberal cultural assumptions and biases which permeate discussions of New Yorkers on all sides of the divide and thus perhaps "dilute" in some way my experience as a prosecutor.

[13] Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 51 (1995). See her discussion of the work of Jack Mezirow and others as to adult learning based on "critical scrutiny" of their own and their culture's values, assumptions and beliefs. *Id.* at 47 (citing JACK MEZIROW ET AL., FOSTERING CRITICAL REFLECTION IN ADULTHOOD: A GUIDE TO TRANSFORMATIVE AND EMANCIPATORY LEARNING (1990)). Also, see her description of an analogous student situation. Quigley, *supra*, at 53-54. I do acknowledge that when I cite the above example as a goal of what the student "needs," I am utilizing my hierarchical role as teacher and walking the fine line between "instructor-as-facilitator and instructor-as-social advocate." *Id.* at 61. However, some of our students, as the student above did, come to us with limited life experiences. In dealing with such students who present enormous experiential gaps, I am more inclined to adopt the views of those who argue that not every student benefits from a curriculum and/or teaching approach based solely on adult learning theory. *See* Linda Morton et al., *Not Quite Grown Up: The Difficulty of Applying An Adult Education Model to Legal Externs,* 5 CLINICAL L. REV. 469, 471-90 (1999) (discussing humanism, andragogy and pedagogy, adult learning theories and the clinical response to education theory).

[14] "A third significant goal of clinical legal education-institutional critique-can occur when 'substantive doctrine' is combined with 'field work experience' and 'the policy considerations implicated in legal doctrine.'" Linda F. Smith, Designing an *Extern Clinical Program: Or as You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 530 (1999) [hereinafter *So Shall You Reap*]. Smith gives attribution to Carrie Menkel-Meadow in footnote twelve for considering this a "macro" goal of skill acquisition. *Id.* at 530 n.12 (citing Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 556, 571-72 (1980)); *see also* Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLINICAL L. REV. 623, 625-36 (2003).

[15] *Best Practices of Law Schools for Preparing Students to Practice Law* 52-53, *at* http://professionalism.law.sc.edu/downloads/text1204.pdf (last updated Dec. 7, 2004) (noting that one best practice is to "Integrate the Teaching of Theory, Doctrine and Practice"); *see also* Robert Dinerstein, *Report of the Committee on the*

some epiphanies, but from my experience teaching both in and out of clinic, I knew that students' most transformative moments came from clinic.[16] Moreover, adult students (or even adolescents) learn better when they actually *experience* conflict rather than just talk about it. How wonderful it would be to have students experience an in-house prosecution course.

Within the next two years, in the fall of 1999, I was presented with the opportunity to design and direct an in-house domestic violence prosecution project and have done so for the last four years. The complementary relationship between the development and design of the clinical project and the evolution of local domestic violence courts in the Capital Region of New York State is a hallmark of the ALS hybrid clinic. In the past four years, local coalitions of domestic violence activists/advocates, judges, probation officers, prosecutors, law professors, students, defense lawyers[17] and family court law-

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Future of the In-House Clinic, 42 J. LEGAL EDUC. 508 (1992); Leah Wortham, *The Lawyering Process: My Thanks for the Book and the Movie*, 10 CLINICAL L. REV. 399, 408-19 (2003) (discussing the framework for learning to be a lawyer).

[16] Although I tell just one story here to capture my inner clinician's thoughts, my colleagues and I who have taught in and out of clinic have many more. To paraphrase, on any given day, there are a thousand stories in the naked "clinic."

[17] The defense bar was often invited to but did not play a consistent role in developing or re-designing our local courts. This was unfortunate. The defense community can raise legitimate concerns about "problem-solving courts," such as domestic violence courts. *See* National Legal Aid and Defender Association (NLADA)/American Council of Chief Defenders, *Ten Tenets of Fair and Effective Problem Solving Courts* (2002), *available at* http://www.nlada.org/DMS/Documents/1019501190.93/document_info (last visited Apr. 6, 2005). Substantive defense criticism of domestic violence courts include: (1) the model is "inherently biased toward prosecution," is too dependent upon DA policies for identifying domestic violence cases, and is "too closely aligned with victim advocates to retain impartiality," LISA NEWMARK ET AL. (THE URBAN INSTITUTE JUSTICE POLICY CENTER), SPECIALIZED FELONY DOMESTIC VIOLENCE COURTS: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE 44 (2001); *see also* Greg Berman & John Feinblatt, (Center for Court Innovation through grant from State Justice Institute), *Judges and Problem-Solving Courts* 17 (2002) (quoting Susan Keilitz of the National Center for State Courts: "specialized judges can lose their neutrality, or the appearance of neutrality by becoming more educated to the effects of domestic violence and collaborating with the advocacy community."), (2) such courts and allied agencies lose perspective about where their cases fit into the broader range of offenses, exaggerating the seriousness of cases in the domestic violence courts, *id.*, (3) practices such as making participation in batterer in-

yers designed, created or redesigned domestic violence courts.[18] At the same time, the ALS Domestic Violence Prosecution Unit formed and evolved.[19] This article explores the educational, community and personal needs that led to the development and design of a hybrid prosecution project. It evaluates goals for a hybrid prosecution project and some alternative educational models, assessing their ability to be replicated at other law schools. Based on an evaluation of the experience of ALS, this article also offers some recommendations and suggestions for others and the future.

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tervention programs a requirement of release on bail assume guilt and impose penalties without a conviction, infringing on defendants' rights, with the very title of the court presupposing the guilt of all defendants. Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 982-87 (2003); Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work? Lessons from New York*, JUDGES J., Spring 2003, at 5, 41.

[18] Note that domestic violence (DV) courts can refer to a wide range of court structures focused on domestic violence. For a description of New York's DV courts, see *One Family, One Judge: Integrated Domestic Violence Courts*, *at* http://www.courts.state.ny.us/ip/domesticviolence/index.shtml (detailing the structure of the New York Integrated Domestic Violence Courts (IDV)) (last visited Apr. 6, 2005). An IDV court was established in a county near our institution. Described as the "One Family-One Court" concept, the court assigned to the same judge all family, all criminal and some civil matters involving family members. *See One Family, One Judge, supra*. Because the first city criminal court with which we worked was also situated in the same county as the IDV court, the city court's domestic violence initiative was labeled a DV *calendar*. For simplicity in this article, I will refer to all domestic violence courts, whether operating as an IDV court or simply as a DV calendar, generally, as DV courts. Domestic Violence calendars refer to the process of organizing the domestic violence cases all at one time or all before one judge, without necessarily providing the full range of staffing, resources, training and services found in an IDV court.

[19] The Albany Law School Clinical Program is organized into a number of projects focused on particular areas of law or particular kinds of clients. For example, we currently operate six in-house projects: Civil Rights and Disabilities, Domestic Violence, Health Law, Investors Rights, Litigation, and Low Income Tax. From 2000-2004, the Domestic Violence Law Project was further subdivided into two separate clinical courses and units: the Family Violence Unit (DVFU) and the Prosecution Unit (DVPU).

II. IDENTIFICATION OF NEEDS AND OPPORTUNITIES: EDUCATIONAL, COMMUNITY AND PERSONAL

Much has been written in the clinical literature about designing an externship or field placement program[20] and about the value and experiences of in-house clinical programs.[21] However, a third form of clinical education has received less attention:

> In addition to these two dominant forms of real client clinical programs [in-house and external/externship], there is a third type of clinical program often referred to as "hybrid" clinics, combining features of in-house and externship programs. In a hybrid clinic, a law school creates a partnership with a legal provider, such as a civil legal service office or

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[20] *See generally* Symposium, *Developments in Legal Externship Pedagogy*, 5 CLINICAL L. REV. 337 (1999) and Symposium, *Externships: Learning from Practice*, 10 CLINICAL L. REV. 469 (2004) (describing various issues relating to clinical legal education). For articles that are particularly helpful in thinking about clinical design, see *So Shall You Reap*, *supra* note 14, and Mary Jo Eyster, *Designing and Teaching the Large Externship Clinic*, 5 CLINICAL L. REV. 347, 348 (1999). For a more recent update which thoughtfully evaluates contrasting models of supervision, oversight and training, see Barbara A. Blanco & Sande L. Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students*, 10 CLINICAL L. REV. 611 (2004). For an excellent overview of materials relating to clinical legal education, see *Clinical Legal Education: An Annotated Bibliography* (J.P. Ogilvy & Karen Czapanskiy eds., 2004), *at* http://faculty.cua.edu/ogilvy/Biblio04A.pdf. [hereinafter *CLE Bibliography*]; *see also* Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 417-21 (1996).

[21] In the section entitled "clinical design" (located in the *CLE Bibliography*), there are over ninety articles discussing in-house clinical issues. *See, e.g.,* Susan Bryant & Maria Arias, *A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207 (1992); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639 (1995); Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239 (1990); Mary Helen McNeal, *Unbundling and Law School Clinics: Where's the Pedagogy?*, 7 CLINICAL L. REV. 341 (2001); Michael Meltsner & Philip G. Schrag, *Scenes From a Clinic*, 127 U. PA. L. REV. 1 (1978); J. Michael Norwood, *Requiring a Live Client, In-House Clinical Course: A Report on the University of New Mexico Law School Experience*, 19 N.M. L. REV. 265 (1989); Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001).

> public defender office, and the students enrolled in the clinic are supervised by both a full-time clinician and lawyers from the outside office.[22]

In 1999, when I set out to design a hybrid project, with a few exceptions, little had been written or documented about hybrid clinics, in particular hybrid prosecution clinics.[23] Therefore, I resorted to my understanding of classic clinical methodology and of collaborative approaches found in both the field placement and the in-house traditions: examine the needs, goals and potential opportunities for students, the law school, the community (both grassroots and public sector portions) and the faculty member;[24] evaluate the methods of achieving those goals and the alternative models already designed by those mentors and teachers in the clinical community;[25] and attempt to use an integrated,[26] reflective,[27] holistic,[28] culturally

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[22] Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?*, 10 CLINICAL L. REV. 681, 682 n.1 (2004) (citation omitted). "When law school faculty assume full or partial responsibility for case supervision in an external placement, the clinic is sometimes referred to as a "hybrid," as it blends features of both an in-house and external clinic." Wortham, *supra* note 15, at 445. Also, see the reference to hybrid literature, *supra* note 5.

[23] *See So Shall You Reap*, *supra* note 14, at 534 (noting that in-house "criminal prosecution clinics are . . . rare within law school"). A few commentators have described themselves as teaching an "in-house" prosecution clinic and have written about those experiences or used those experiences to explore other issues. *See* Caplow, *supra* note 2, at 27-35. "Faculty-supervised clinics in which students personally handle the prosecution of the case are unusual. The more typical model is an externship that places students in local and federal prosecutors' offices . . . ." *Id.* at 1 n.2. "There are far fewer criminal prosecution clinics than there are criminal defense clinics. There appears to be an implied assumption that criminal defense clinics provide a better educational experience . . . . This article reexamines the assumption . . . ." Karen Knight, *To Prosecute is Human*, 75 NEB. L. REV. 847, 850 (1996). For brief references to prosecution clinics, see Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988); *see also* Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 154 (referencing a Child Abuse and Domestic Violence Prosecution Project).

[24] Wortham, *supra* note 15.

[25] *Id.*

[26] *See generally* Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 410 (1994).

[27] *See generally* Richard K. Neumann, Jr., *Donald Schon, the Reflective Prac-*

competent,[29] problem-solving,[30] inter-disciplinary[31] and "rebellious"[32] approach to creation of the program.[33]

With respect to the first prong above, the desire to create a hybrid prosecution clinical opportunity arose from my perceptions of need in several areas: students' educational needs, community needs and personal/faculty needs. Complementing these needs, opportunities for collaboration and innovation existed because of the maturity of the ALS clinical program,[34] the loyalty of our alumni/ae base, the idealism, openness and expertise of the local and statewide domestic violence advocacy community and the flexibility of the clinical director at that time.[35] These overlapping needs and opportunities intersected

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titioner, and the Comparative Failures of Legal Education, 6 CLINICAL L. REV. 401, 402-18 (2000).

[28] *See International Alliance of Holistic Lawyers, at* http://www.iahl.org (last visited Apr. 6, 2005). "The idea of holistic lawyering, for example, suggests that legal practitioners should be client-centered in their approach, viewing their responsibilities as not just solving issues of law but also helping address the various problems (both legal and nonlegal) that have contributed to their client's troubles." Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 283 (2003).

[29] *See generally* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 78-99 (2001).

[30] *See generally* Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 448-49 (2002).

[31] *See generally* Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 325-28 (1999).

[32] *See generally* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

[33] It's harder to get all the terminology out than it is to be mindful of it in teaching and practicing! For an overview of current clinical approaches and thinking, see Barry et al., *supra* note 5, at 16-26.

[34] ALS's clinical program traces its roots back to approximately 1975. Clinical colleagues are currently working on assembling a history. When I discuss "maturity," I am also referring to the fact that there were established and longstanding clinical projects, an extensive field placement program and that the faculty contained three tenured clinicians with full voting rights and a long-term contract process for other clinicians.

[35] I am grateful for the flexibility of ALS Associate Dean and Professor Connie Mayer, Clinical Director from 1991 to 2001, and for her unwavering support of this initiative.

to fashion the design of a hybrid domestic violence prosecution project.

A. *Examining Educational Needs and Identifying Educational Goals for a Hybrid Prosecution Project*

In designing a project, *educational needs* should be examined on at least three levels: (1) examination of the overall institutional needs or gaps in the curriculum, (2) examination of the needs or gaps in the clinical program and (3) examination of student needs and desires. In examining my institution's needs and gaps, I concluded that there was good reason to design a hybrid prosecution project. For instance, there was a lack of diversity on our criminal law faculty. Moot court activities, trial advocacy classes and the field placement program[36] did not provide full opportunities to teach important clinical judgment in prosecution[37] or prepare students for the changing variables of real practice. Most importantly, there was a clear student desire for more prosecution placements.

At the time the clinic was being created, ALS's traditional or "stand up" criminal law faculty was exclusively male.[38] There was unquestionably a lack of diversity on that faculty and a perception among students that women's issues were not being addressed thoroughly.[39] This perception was in fact a

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[36] *See infra* note 60.

[37] Pace Law School Professor Vanessa Merton has informed my thinking about the teaching of clinical judgment in prosecution and is currently writing a piece on this topic.

[38] These professors are my colleagues and friends, whom I esteem greatly. Indeed, they were invaluable resources to my students and me during the years I directed the Post-Conviction Project. One professor even co-taught the contemporaneous seminar with me. However, it was unquestionably a white, male criminal law department teaching first year criminal law. Thankfully, our criminal law faculty has become more diverse with the addition of a wonderful colleague, Professor Lenese C. Herbert.

[39] During the 1990s, female students at Albany Law School often complained to clinical professors that issues of rape and domestic violence were either not being taught, not presented from a feminist perspective, or not discussed fully. At least one traditional faculty member learned of these complaints and reached out to clinical faculty for ideas of how to better incorporate domestic violence issues into the class discussion.

national reality.[40] Despite the "dramatic change in the legal system's response to women who have been battered,"[41] traditional legal education had "virtually ignored" the reality and experiences of battered women.[42] By teaching a hybrid domestic violence prosecution course, I desired further to emphasize not only the evolution of the law concerning violence against women but also ideas about the appropriate response of the criminal law to such violence. I also hoped to introduce a feminist criminal law/prosecution perspective and to provide a model for female students who desired to enter the machismo-saturated[43] world of criminal law.

There are numerous issues involved in the question of whether a hybrid prosecution clinic advances the school's existing professional skills, clinical and placement offerings. Prosecution projects generally focus on fact investigation, victim/witness interviewing, charging and evidentiary analysis, negotiations (offers for reduced charges and/or sentences) and trial skills. Arguably, the curriculum at ALS already provided good opportunities in fact investigation, negotiation and courtroom persuasion.[44] If the project offered nothing more than

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[40] *See generally* Merryman, *supra* note 6.

[41] *Id.* at 383.

[42] *Id.* Albany Law Review, however, held a wonderful symposium on Domestic Violence issues in March of 1995. *See generally* Symposium, *Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues*, 58 ALB. L. REV. 959 (1995).

[43] *See, e.g.*, Rena M. Atchison, *A Comparison of Gender Bias Studies: Eighth Circuit and South Dakota Findings in the Context of Nationwide Studies*, 43 S.D. L. REV. 616, 622-23 (1998) ("In the area of criminal practice, male attorneys in the Eighth Circuit outnumbered female attorneys eight to one" and in government men are more likely to be in the criminal positions); Elizabeth Erny Foote et al., *Women Rainmakers When It Rains, It Poors*, 45 LA BAR J. 422 (Feb. 1988) (noting criminal defense bar was and still is dominated by male attorneys and by the "macho mystique" associated with criminal defense work).

[44] Albany Law School, like many other schools, had an extensive moot court and trial advocacy program which, in particular, taught good "courtroom skills." From 1995-2000, Albany Law School's Moot Court teams consistently reached the semifinals and finals of numerous interscholastic competitions around the country, including the ABA National Criminal Justice Trial Advocacy and Association of Trial Lawyers of America competitions. In 1996, the faculty had also adopted a voluntary professional Skills Competency program, pursuant to the MacCrate Re-

simply another opportunity to learn about or be exposed to these skills, it would not be filling an unmet need.

Of course, clinics do much more than teach skills. In addition to teaching how to learn from experience and to think and practice like a lawyer, most clinical projects differ from simulated courses because they allow students to assume the role of a professional and deal with ever changing facts and people. Prosecution clinics do all that too. Prosecutor clinics, however, do *not* provide opportunities to represent individuals and practice client centered representation.[45] Thus, it is important to consider whether the existing curriculum and clinical program generally include adequate opportunity for students to represent actual clients and to teach client-centered counseling. If not, perhaps the program should consider adding a client-based clinic in which students form an attorney-client relationship with a flesh and blood human being before allocating faculty resources to a prosecution project.[46]

The clinic's place in the larger community should also be examined. Do the law school and clinical program work together with the community on an adequate number of opportunities? If not, perhaps a clinical program should establish credibility in and linkage to its community.[47] Are there a good

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port, which introduced new simulated skills courses, emphasized the value of skills offerings and certified students in skills such as drafting, fact investigation, alternative dispute resolution and persuasion. *See* Faculty Proposal (on file with author). That proposal also created a new year-long course in civil Pre-Trial and Trial Litigation (PTTL). *Id.*

[45] This is not to suggest that issues such as victim-centered counseling, the question of who is the prosecutor's client, and the contrast between prosecutors' and other lawyers roles cannot be explored in a prosecution clinic. *See generally* Knight, *supra* note 23; Caplow, *supra* note 2, at 44. Indeed, my students always participated in clinic-wide sessions on client-centered counseling and we used these skills and lessons in our work.

[46] I suppose other considerations such as clinically teaching important skills of advanced research and writing, civil discovery or the skills of working on large cases should also be considered. But, they fall lower down on the hierarchy of importance in my mind.

[47] *See* Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187 (1992); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307 (2001).

number of projects which enable access to justice, raise social justice awareness and instill a strong pro bono ethic? If not, perhaps scarce resources should not be devoted to assisting government or to imprison the poor.[48] As Karen Knight humorously points out: "Nebraska's prosecution clinic has been likened by some members of the faculty to providing free legal services to IBM."[49] On a more serious note, the dearth of well-funded and vigorous criminal defense does suggest that a criminal defense clinic should be considered before a prosecution one.[50]

Examining the application of these questions to the ALS clinical program, I concluded that there were good reasons for forging ahead, in spite of other reasons suggesting reconsideration. ALS is fortunate to house a multi-faceted in-house clinic and an extensive field placement program which provides students numerous opportunities to learn about and practice client-centered representation and whose faculty and students work with and in the surrounding community. At the time of the creation of the hybrid prosecution clinic, the in-house clinic consisted of three community-based clinics[51] and another long-

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[48] *See* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 398 (2001) [hereinafter *Good Prosecutor*].

[49] Knight, *supra* note 23, at 865. Note that some other law school clinics do place students at private firms and businesses when pedagogical reasons warrant such placement.

[50] *See Good Prosecutor*, *supra* note 48 (describing the racism, classism and serious "justice" problems which are rampant in the prosecution of crimes); *see also* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (calling for legal scholars to move beyond abstract justifications of criminal defense work to explore and develop motivations for lawyers to represent the indigent); *see also* John Gibeaut, *Defense Warnings*, A.B.A. J. Dec. 2001 at 35, 35 (2001) (describing counties where "public defenders are so swamped that they can't even dream of satisfactorily representing their indigent clients."). For an excellent outcome analysis of the favorable results obtained by three years of students in the NYU Criminal Defense Clinic and the significant contribution law students make to represent indigent people accused of crimes, see Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on The Rights of the Accused*, 62 BROOK. L. REV. 853 (1996).

[51] They were: the Family Violence Project in which students represented survivors of domestic violence in family court and on civil matters, an AIDS/HIV

standing clinic which received referrals from our local Legal Aid office.[52] The community-based clinics were well known, worked with advocates and other community groups, and provided representation, training, information and referrals to local individuals. The bounty of client-centered opportunities for students, [53]the large number of clients represented and the extensive work done with community partners on social justice matters gave me the "freedom" to consider a clinic that was not client-centered.[54]

True, after the post-conviction project ended, we did not and still do not have an in-house criminal defense clinic, and that is certainly a gap in our program.[55] One of the reasons involves the politics of some members of our local public defense bar.[56] Another reason is that the level of criminal de-

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Law Project in which students represented clients on matters of custody, guardianship, health care and end-of-life decision making and a Civil Rights and Disabilities Project in which students represented individuals with disabilities on matters of education rights, employment rights and other discrimination issues. Since then, the clinic has expanded to include a Low Income Tax Project and an Investors Rights Project. In addition, the AIDS/HIV project was subsumed within a Health Law Project which has two units the AIDS/HIV unit and the Cancer Care unit.

[52] The Litigation Project partners with the Legal Aid Society of Northeastern New York to provide representation to clients on unemployment insurance matters.

[53] In addition to the approximately thirty to forty slots in the in-house clinic, we also offered many client-centered field placements in local not-for-profits such as Disability Advocates, Legal Aid, and Mental Hygiene Legal Services. Since our clinic has expanded, so has the number of students.

[54] For more of an exploration of this topic, see Mary A. Lynch, Can You Be a "Good Person," a Good Clinician and a Supervisor of Student Prosecutors?, presented at the 2005 AALS Clinical Section Conference as a "Work in Progress," which expands on and responds to Abbe Smith's article, *Good Prosecutor*, *supra* note 48, *at* http://www.aals.org/clinical2005/works.html.

[55] The project had been funded by Title IX monies. For a history of the funding of clinical education, see Michael Meltsner & Philip G. Schrag, *Report From a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976); *see also* Barry et al., *supra* note 5, at 19-20.

[56] We have some outstanding and zealous local public and assigned counsel defense attorneys. However, not all local criminal defense attorneys welcome assistance from the law clinic. Some local lawyers view free student work as cutting into the bread and butter of practice. *See* MCKINNEY'S NEW YORK RULES OF COURT 805.5(d) (stating law students "may render assistance to indigent persons

fense work in one public defender office was so substandard that we removed it from our field placement program since we believed students would learn how *badly* to represent individuals accused of a crime. Frankly, no clinician has yet had either the freedom to design such a project or the fire in his/her belly to take on the hard work to overcome these obstacles.[57] But criminal defense aside, a prosecution project would complement our existing civil in-house clinic nicely.[58]

It was also true that Albany Law School, in theory, already provided plenty of opportunity for "institutional critique"[59] and exposure to law practice through its field placement program.[60] Our field placements provided wonderful opportunities for exposure to real life practice, to test the waters of certain subject matter areas, and to practice lawyers' skills. Some students have had life-altering experiences in the program: they gained a mentor for life, experienced an epiphany about a career path or engaged in the best educational experience of law school. Within this program, opportunities existed with at

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in any matter in which a party does not have the right to assignment of counsel"). Note, however, that we arranged for an exception to this rule in the case of our Family Violence Unit.

[57] These obstacles are not just my own perceptions, but are shared by my colleagues in the clinic and in particular by my colleague who has far greater criminal defense experience, knowledge and contacts than I do.

[58] So, was I just "playing it safe" by designing a hybrid prosecution project? Probably. Am I terrified by the idea of a criminal defense clinic where my students and I are responsible for people's liberty and life? Absolutely!

[59] *See generally So Shall You Reap*, *supra* note 14.

[60] Albany Law School runs an extensive field placement program with over 200 placement opportunities and over 100 students participating each semester. Albany, as a major capital city, provides a wealth of opportunity for field placements. Adopted in 1987, our current field placement model takes advantage of our location by offering students anywhere from seven to ten sections of placements clustered by subject matter: Environmental, Criminal Defense, District Attorney, Government and Public Service, Health Law, Judicial, Legal Aid, Science and Technology, and United States Attorney placements. Each placement cluster is taught by an adjunct clinical professor/expert practitioner. The director of our Field Placement, a full time faculty member, performs oversight over all placements and all ten or so adjunct clinical professors, holds orientation sessions, classes, panel presentations as warranted, requires journaling in appropriate situations for purposes of institutional critique and reflection and meets twice a semester with all 100-plus students. *See also* note 66.

least four regional and geographically convenient district attorneys' offices, the United States Attorney's office and the New York Prosecutors Institute.

Something truly irked me, however, about the experiences of students placed in local district attorney offices. It may well be that my prior experience as an assistant district attorney in Manhattan made me more sensitive to—or judgmental about—the experience of students placed in these offices. The students seemed to swallow whole the culture of a particular office—to be unable to separate process, procedure and skills from viewpoint, strategy and political bent. At first, I thought the fault lay in our field placement model of having expert practitioners teach the classes. The discussion of institutional critique, reflection, and diverse perspectives that should be integral to the classroom experience were lacking. Working more closely with adjunct faculty to ensure appropriate discussion, however, did not solve the problem. Even when I attempted to initiate critical discussions in individual meetings with students, or in the periodic class sessions, something was missing.[61] Comparing my discussions with field placement students to earlier discussion with in-house clinic students in which we critiqued our cases, our lawyering and the systems with which we were involved, I realized what was missing. Context. The shared mission. The joint understanding of facts.

This is where my sense of student needs and desires became the paramount reason for starting the clinic. I, like other commentators, believe not only that we clinicians should provide options to encourage students to engage in public interest or public defense work, but we need to meet students where they are.[62] At ALS, large numbers of students desire to go into prosecution at some time in their career.[63] Each semester at

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[61] *See* Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 CLINICAL L. REV. 659 (2004) (arguing that the externship classroom component should cease to be required and instead taught only if the class adds value to a field placement program).

[62] *See generally* Eyster, *supra* note 20; Luban & Millemann, *supra* note 5.

[63] An argument could be made that rather than just accepting that students are not selecting criminal defense as a career, we should provide more opportu-

least twenty to twenty-five students enrolled in the prosecution placements. Our district attorney placements were and are consistently over-subscribed. Moreover, upon graduation, our students were "pour[ing] into prosecutors' offices."[64] Nationally, NALP statistics show that approximately five percent of graduates, whose employment is known, become prosecutors. At Albany Law School we consistently surpass that national average and turn out large numbers of prosecutors, a number of whom staff the several counties surrounding ALS.[65]

With so many students interested in prosecution, I wanted to offer an educational opportunity which provided more than our typical field placement experience.[66] I believed we needed to prepare these students better to assume the responsibility of prosecutorial discretion so early in their careers.[67] As recent graduates, these students would have enormous effects on the lives of victims and their families, defendants and their fami-

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nity and inspiration to practice criminal defense by setting up a criminal defense clinic. There is some merit to the argument. Certainly, in the Capital Region of New York, where ALS is located, there is a need for training more zealous criminal defense advocates. ALS did offer a post-conviction clinical project, which I ran for four years. Upon graduation, some students chose to practice criminal defense, but more students became prosecutors. The need for competent and committed criminal defense has certainly been documented. *See* Ogletree, Jr., *supra* note 50. None of these arguments, however, suggest that a prosecution clinic should not be offered. To be frank, I would be delighted if one of my colleagues with more experience in criminal defense would do so. *See Good Prosecutor*, *supra* note 48.

[64] Caplow, *supra* note 2, at 44.

[65] The ALS Office of Career Planning statistics reveal that from the classes of 1997-2003, an average of seven to nine percent of students, whose employment was known, became prosecutors.

[66] Like many field placements, ALS boasts of some that provide learning equivalent to an in-house clinic with excellent teacher-practitioners as field supervisors who can teach to an enormous variety of learning styles. Other placements meet other goals and would not provide the same kind of learning experience. My work in ALS's in-house clinics from approximately 1989-1997 and then as Director of the Field Placement Program from 1998-2000 provided me with some perspective on our clinical program and the ability to compare the advantages and disadvantages of both types of program. It also provided me with the opportunity to perform an informal-needs assessment of our clinical program.

[67] Unlike offices in large major cities such as the Dade County (Florida) District Attorney's office or the Manhattan DA's office in which new prosecutors undergo intensive training programs which last a month or more, local counties provide little or no training to new assistants.

lies, and communities. Had they been exposed to critiques of the justice system which challenged the policies used in the local district attorneys' offices in which they practiced?[68] Did they understand the difference between tactics that were acceptable for a civil attorney or a criminal defense attorney to use, but not appropriate for the prosecutor?[69] Had they encountered the difficult, if not insurmountable, tension between the "adversarial" nature of the system and the "do justice" mandate for prosecutors?[70]

It seemed to me that we, as clinical teachers, too often left the students interested in criminal prosecution to the traditional faculty, the simulated skills courses, the moot court program, and the offices in which students are placed in the field placement program. Although there is great merit to substantive law and skills training, moot court, and field placements, none of these present the kind of opportunities an in-house clinic provides to integrate, discuss and practice problem-solving, clinical judgment, professionalism, interpersonal skills, ethics and morality while quickly applying facts to law in a particular procedural and cultural system. It is only in an in-house clinic that students have the dual goal of acting as the "lawyer on the case" while learning from an intellectual exploration of the dynamics of what happened and why. In order to teach future prosecutors best, I needed to create an in-house prosecution clinic which mirrored the best aspects of our community-based clinics.

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[68] *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132-50, 170-71 (2004) (describing the institutional culture of prosecutors' offices and discussing the need for continued education and "re-orientation" of prosecutors).

[69] *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1983). *See also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1980).

[70] *See* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 113-24 (1998) (exploring the ambiguities and tensions of the plea bargaining process since prosecutor's have an "undefined obligation" to "do justice" and yet at trials are considered to be participating in the adversarial role").

B. Community Needs for a Better Approach to Domestic Violence Prosecution

Creating a network of coordinated, comprehensive, holistic community responses which support the victim and hold the batterer accountable[71] is the most effective way to address the complex and difficult issues surrounding domestic violence crimes.[72] Battered women survivors[73] and their advocates were rightfully troubled and frustrated by the local criminal justice response to domestic violence in the Capital Region. Although legal and statutory changes had been made in attempts to support the victim and hold the batterer accountable,[74] implementation and attitudes at the grassroots level remained (and still remain) problematic.

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[71] My work in women's prisons with incarcerated, battered women who killed their abusers had indelibly impressed upon me the fatal consequences that occur when domestic violence goes ignored and when community systems fail to support battered women.

[72] Notably, this goal is not inconsistent with educational goals. *See generally* Lois J. Kanter et al., *Northeastern's Domestic Violence Institute: The Law School Clinic as an Integral Partner in a Coordinated Community Response to Domestic Violence*, 47 LOY. L. REV. 359 (2001).

[73] I purposely use the term "battered woman survivor," "battered woman" and "victim" throughout this article and am fully cognizant of the controversy surrounding the terms. This is not because I disagree with scholars such as Professor Elizabeth Schneider who complains about the reductive nature of the term "battered women." *See* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 60-62 (2000). Nor is it because I disagree with scholars who call for a redefinition of the issues. *See, e.g.* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991). Rather, it is because I, like Professor Deborah Tuerkheimer, knowing full-well the falsity of the victim/agent dichotomy, use these terms to simply "emphasize the basic proposition that women are harmed by battering." Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1031 n.3 (2004).

[74] I refer here to mandatory arrest, primary aggressor and stalking statutes, as well as to the elevation of crimes such as criminal contempt for repeatedly violating orders of protection. *See* Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281, 282-83 (2003) (arguing that mandatory arrest policies take power away from women who are in abusive relationships); Tuerkheimer, *supra* note 73. *See generally* DALTON & SCHNEIDER, *supra* note 1, at 564-714 (describing the relation between the criminal justice system and domestic violence).

Clinical colleagues who supervised students in family court throughout the region described unresponsive police officers and unresponsive or overzealous prosecutors. Field placement students related stories of judges, assistant district attorneys and defense attorneys who treated domestic violence cases as petty annoyances to be quickly resolved and removed from the court calendar. There was a preoccupation with exerting prosecutorial or judicial power and not letting the victim "abuse" and "control" the system.[75] Scholars, activists, some policymakers, some politicians and students (some of whom had personal or professional experience with domestic violence situations) all agreed on the need for a more holistic, coordinated, cooperative, community- based approach to the problems of domestic violence.[76]

These community needs, which are not unique to the Capital Region of New York, provided opportunity for collaboration. Immediately east of ALS sits Rensselaer County. It had several characteristics which recommended it for the hybrid project. First, there was an excellent activist battered women's shelter which was part of a larger community services program and which appeared to have its fingers on the pulse of the struggling city of Troy, New York[77] and surrounding areas.[78] Second, the city itself and the legal, social service, and public service community were small and centralized enough to be able to have students meet with, and form relationships with, a

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[75] This is different from not letting the abuser control the system through his control of the victim. *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1555 (1998).

[76] *See Model Domestic Violence Policy for Counties*, *at* http://www.opdv.state.ny.us/coordination/model_policy/index.html (last visited Apr. 6, 2005) (detailing the model cooperative approach that was developed in New York State); *see also* Kanter, et al., *supra* note 72.

[77] Troy is the largest city in Rensselaer County with a population of nearly 50,000. *See* http://quickfacts.census.gov/qfd/states/36/3675484.html (last visited Apr. 6, 2005).

[78] My impressions of the shelter-advocacy program as "excellent" was based on the evaluation of policymakers and advocates in the domestic violence community. These advisors included visionaries, state government types and grassroots types who I had come to know well through clinical work on behalf of incarcerated battered women.

small set of key stakeholders, officials and courts. Third, innovative people working in a number of key stakeholder organizations were frustrated by the status quo and eager for change. Since many battered women had been well-served in family court by ALS students, the local battered women's activist community had already established links with our domestic violence clinic, had formed good impressions of the quality of work performed by ALS students and encouraged our involvement in efforts to improve the criminal justice system. In addition, a local activist probation officer,[79] who was well-trained on violence against women, and committed to improving the criminal justice response for battered women began to push for development of a new approach to handle domestic violence cases in Troy. It appeared that the community could be well-served by more and better prosecutorial staffing in domestic violence cases, and the students would be well-served by interaction with the community.

Based on the suggestions of community and government activists, the local city court judge who handled the criminal calendar called together an informal task force to discuss how best to meet the shared goals of providing more support and integrated services for victims, better monitoring of batterers, and encouraging victims to cooperate with the prosecution. He reached out to the local prosecutor, the local battered women's shelter and other community groups and organized a "field trip" to two domestic violence courts running in New York City-a misdemeanor court in Bronx County and a felony court in Brooklyn (Kings County).[80] For all of the reasons cited earlier, this creative task force held promise for me with its focus on better prosecution of domestic violence. So I called up the local city court judge, informed him of my intention to create a hybrid prosecution clinic and became part of the design team for the court.[81]

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[79] He had received special training pursuant to the federal Violence Against Women Act.

[80] *See supra* note 18 and accompanying text.

[81] I made clear the intentions to combine educational goals for students with

C. Personal Needs for a Balanced Life

Some clinical authors remind us that it is "okay" to admit to having a need for a personal life and that teaching about practicing law without discussing such needs and balance is incomplete.[82] I believe it is also important to document those challenges. For in addition to the educational and community needs for this hybrid project, it suited my personal needs as a faculty member. The spring semester of 2000 was a critical decision time for me. I had been teaching clinically since 1989. In the mid to late 1990s, I tried to do everything at once: teach seminars, handle difficult high profile cases, do excellent clinical supervision, respond to community needs, serve on community and statewide task forces, get tenure, serve on or chair important faculty committees, and raise two kids. I burned out. After going part-time, teaching seminars and skills classes, or directing the field placement program for a couple of years, I was approached by the then clinical director with the request to have me teach "in the clinic" again. I was ready to supervise students on cases again and teach clinical skills through real

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the criminal justice and domestic violence communities' goals of "improving" the handling of domestic violence cases-that this was not just about student labor. Of course, I do not at all mean to suggest that the advocates and activists and the probation/law enforcement/prosecutors all had the same sense of what "improvement" meant. For example, the advocates wanted more deference to the victim's preferences and understanding of her situation and more "prosecution without the victim." The court wanted more "cases that didn't fall apart." The district attorney's office hoped to persuade more victims to "cooperate" with the prosecution. However, all did agree that the current system had many gaps and that a common goal was improved batterer accountability and better provision of support and services for the victim.

[82] For detailed discussions of the personal/professional balance, see generally Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207 (2002); Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221 (2002); *see also* Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Values, Motivation and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 122-24 (2002); Mary Helen McNeal, *Message From the Chair*, ASS'N AM. L. SCHS. SEC. CLINICAL LEGAL EDUC., No. 1 (Apr. 2001) (describing her desire to set a positive professional/personal life balance for her clinic students).

cases, but I was not prepared to take on the grant pressures, community pressures and case pressures which came with much of the in-house clinic work at Albany Law School.[83] Nor was I willing again to sacrifice my time with family, or a healthy balance of work and leisure.

At the American Association of Law Schools (AALS) conference in January 2000, I sat at lunch with longtime clinician Robert ("Bob") Seibel.[84] We were able to discuss clinical teaching, grant pressures, stand up and skills teaching, handling cases, stress and the joys and challenges of life. Bob listened carefully and empathetically made several memorable suggestions. Particularly appealing was his description of the rewarding work of co-teaching and collaborating with someone who was primarily responsible, along with the students, for the client's case. He suggested that I think about proposing a clinic in which I was responsible for designing or co-designing the program and curriculum, some direct supervision, classroom teaching, collaborations with field supervisors/adjunct, and instilling clinical methodology and a reflective approach.[85]

III. Selecting Goals and Choosing Appropriate Educational Models for a Hybrid Prosecution Clinic

Having identified the need for a hybrid domestic violence prosecution clinic, goal setting was next. This should be the part of the article in which I describe how I sat down and in an organized fashion, narrowed down which of many competing academic goals my new clinic would meet, and then carefully

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[83] *See generally* Nancy M. Maurer, *Handling Big Cases in Law School Clinics, or Lessons From My Clinical Sabbatical*, 9 CLINICAL L. REV. 879 (2003) (exploring the ups and downs of handling big cases in law school clinics).

[84] Bob is currently a clinical professor of law at the City University of New York School of Law where he is co-director of the Elder Law Clinic.

[85] It is not surprising that Bob gave such sage advice about potential options for teaching. He is the author or co-author of many helpful articles about field placement design. *See generally* Robert F. Seibel et al., *An Integrated Training Program for the Law and Counseling*, 35 J. LEGAL EDUC. 208 (1985); Seibel & Morton, *supra* note 20.

designed my program to meet those, and only those, goals.[86] However, a more candid description of the process which actually occurred closely mirrors that described by American University, Washington College of Law colleagues who wrote:

> [C]ontrary to the way clinical literature often conceives of program development—we did not start by articulating a complete set of goals, around which we then built a program. Instead, goal formation and program development occurred together in a far more complex, interactive process. The steps we took in building a program led to the identification of our pedagogical goals, just as articulating those goals pointed the way towards next steps in program design.[87]

A. Goal Setting

Upon reflection,[88] there were four primary sets of goals. One set of goals involved teaching professionalism, prosecutorial ethics and professional duties in the context of making prosecutorial decisions. Another set of goals involved skills and the opportunity to practice skills in context: teaching good skills of victim and witness interviewing, fact investigation, charging, and plea negotiations, as well as hearing and trial skills, and providing opportunities to practice such skills in context. The third set of goals was interdisciplinary and involved exposing students to domestic violence social science theories and the interplay with prosecution at the same time that students were learning the governing law and procedural rules. This would enable students to observe disconnects be-

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[86] *See supra* notes 24-33 and accompanying text.

[87] Peter Jaszi et al., *Experience as Text: The History of Externship Pedagogy at the Washington College of Law, American University*, 5 CLINICAL L. REV. 403, 404 (1999).

[88] From attending clinical conferences, participating or viewing the clinical listserv and reading the Clinical Law Review, "thinking like a clinician" occurs almost by osmosis. The image that comes to mind is a spiritual one. Some spiritual writers describe an aspirational state of the soul in which "every breath is a prayer." So too there seems to be an aspirational state for a clinical teacher in which goal setting, integration of theory and practice and reflection occur as naturally as breathing.

tween social science knowledge and the operation of law on behavioral /criminal matters, and view the interplay through the prism of the development of domestic violence law. The fourth set of goals was, frankly, social justice oriented. I wanted students and the clinic to engage not only in institutional critique but reform and to provide better access to justice for victims of domestic violence.

Moreover, it was very important to me that the hybrid clinic should have more of a "rebellious" than a "regnant" design.[89] By that I mean that it should not teach students to practice the status quo but rather should teach in a manner that challenged the criminal justice system.[90] Perhaps, it would engender an attempt to "re-imagine" social arrangements so that the criminal justice system was encouraged to view the experience of women who encountered domestic violence, along with the experience of the domestic violence advocates, as the pivotal information in determining prosecutorial and judicial decision making.[91] By "rebellious," I also mean

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[89] Some might cringe when I use this word and the obvious reference to Gerald Lopez's work in association with a prosecutor's office. *See* LOPEZ, *supra* note 32. However, for more of an exploration of this topic, see Lynch, *supra* note 54.

[90] By admitting this design desire, I am certainly liable to the criticism of those like David Chavkin who propose we must choose between social justice work and clinical teaching. *See* David F. Chavkin, *Spinning Straw Into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 261 (2003). However, my eye was always "on the ball" of teaching students. In addition, students who wanted to become prosecutors needed to learn not just skills but lifelong lessons about how to practice ethically and productively in a faulty system. In other words, learning to challenge and change the system should go hand in hand with learning to operate within the system.

[91] Sometimes this "experience" would coincide with the victims articulated requests on a particular case and sometimes it would not. For example, the victim may not want to testify or cooperate with prosecuting the batterer. One question is should the prosecutor force her to testify? Another is should the prosecutor drop the case? However, there are less extreme approaches which respect the victim's view but do not allow the batterer to control the case through his control of her. *See* Hanna, *supra* note 76; Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 196-99 (1997); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 174-75 (1997); Sarah Buel, *Family Violence: How to Hold the Offender Accountable While Taking the Victim Out of the Danger Loop: Prosecute Without the Victim*, TEXAS PROSECU-

that I wanted the design of the hybrid clinic to grow from the needs of the local community members and to be heavily influenced by the wisdom of non-lawyer domestic violence activists.

B. Selection of Educational Model[92]

Although goal setting and "design" is usually a very dynamic process, the assessment of which educational models will work at which institution is generally more practical and concrete. This assessment will be important for anyone designing a prosecution project. Preliminarily, acquisition of a caseload is a very real problem for clinicians designing a hybrid prosecution project. Unlike other in-house projects, a prosecution project cannot simply announce itself open for business but must work with a local prosecutor and/or a district attorney's office. Each community has its own unique characteristics which will provide opportunities and/or obstacles to development of a hybrid prosecution project. Some law schools may be located far from the district attorney's office or courts. Others might be limited to working with a district attorney or a local judge who is disinclined to accommodate students' educational needs or is suspicious of clinic faculty involvement. In another case, the chief

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TOR 18 (Mar./Apr. 1997).

[92] By discussing only the Pace and Brooklyn clinics, I do not mean to suggest that other clinics could not also be used as the models. For example, Karen Knight's work seems to be the earliest on this subject and describes a very useful model. Indeed, while working on this symposium article, I have learned much about other models such as the "midternship" model used at the Baltimore City Child Abuse Prosecution Clinic in which a "teaching solicitor" (Professor Millemann) and a "barrister" (the prosecutor) worked together. Email from Michael Millemann, Professor, Baltimore City Child Abuse Prosecution Clinic to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Nov. 18, 2004) (on file with author). Professor Millemann notes that he "supervised the students and their work as fully and regularly (once a week regular meetings, in 2-3 student work groups, with lots of 'as needed' contacts) as I did, and do, in my in-house clinics, with the exception that the prosecutor did in-court supervision, as well as a fair amount additional out-of-court supervision. *Id.* Sometimes, we jointly supervised the students (were both physically present during the meeting), but more often it was separate." *Id.* This model most closely resembles mine. For a listing of other hybrid prosecution clinics of which I am aware, see *infra* notes 97, 102, 112 and accompanying text.

district attorney may be supportive, but the line assistants may only find students useful in limited circumstances. Still other law schools might find not only willing prosecutors and district attorneys, but engaged community activists eager to work with the law school in improving the delivery of criminal justice. As I will discuss later, the last scenario was the one in which I found myself.

As noted earlier, at the time my clinic started there was a great deal written about how to start and design externships and field placements and much less documented regarding hybrid prosecution projects.[93] There were some models from which to learn, however. Two clinicians who have had much experience in teaching and supervising prosecution clinics are Vanessa Merton of Pace Law School[94] and Stacy Caplow of Brooklyn Law School.[95] Their two models provided a framework against which I could evaluate how to design an Albany model and against which others can frame their own design.[96]

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[93] *See supra* notes 22 and 23 and accompanying text.

[94] Professor Vanessa Merton is the Associate Dean for Clinical Education at Pace Law School.

[95] Professor Stacy Caplow is the Director of the Clinical Education Program at Brooklyn Law School.

[96] I was fortunate to be able to discuss my proposed project with both Professors Caplow and Merton and learned much from their experience. I am very grateful to Vanessa Merton for generously sending me curriculum materials, her syllabus and other useful information to help with my first semester of teaching in this project. In addition to the clinics mentioned *infra* at notes 98, 103, and 113, Gabrielle Davis directs a hybrid domestic violence prosecution clinic at the University of Toledo. John "Aloha" Barkai has taught a prosecution clinic for the past fifteen years at Hawaii in which he does the out of court supervision of students and teaching while the deputy prosecutors supervise students in court. St. John's Professor Michael Simons coordinates adjunct professors/assistant district attorneys who have worked with him in developing the classroom program. There are many other prosecution clinics nationally. Apologies to teachers of any hybrid clinics whose programs I have failed to mention.

1. PACE: "Hiring" a Prosecutor/Teaching Partner and Bringing Her Specialized Caseload to the Clinic[97]

The Pace model was designed by Professor Vanessa Merton, director of the Pace Law Clinical Programs.[98] In 1994, Pace Law School began operation of their Prosecution of Domestic Violence Clinic. Under a creative arrangement with the Manhattan District Attorney's office, the clinic was co-taught by Vanessa Merton and a full time assistant district attorney (ADA); the students were designated as special assistant district attorneys (SADA's) who specialize in Domestic Violence. The model works by having the Manhattan DA's office "lend" a prosecutor to Pace for one year while Pace Law School pays her salary. The prosecutor then brings a misdemeanor domestic violence caseload with her to the school. Both Vanessa and the co-teacher/ADA directly supervise the students and appear with the students in court on behalf of the People of the State of New York. Students are assigned individual cases and make all decisions on cases—whether to dismiss, what plea to offer, or whether to demand jail time for the accused. In early conversations with me, Professor Merton emphasized how important it was for her model that the district attorney's office agree to give the clinic total control over the cases, so that it operates like an in-house clinic with students assuming the lawyer/prosecutor role. She said that students often make decisions with which she or the ADA might disagree. For example,

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[97] This model is similar to one used at Ohio State. At Ohio State, a fulltime clinical professor is sworn in as a special assistant district attorney and "takes the cases he wants" from the office. Under this faculty member's supervision, students mostly work at the clinic except for "court meetings and fact investigation." Students exercise prosecutorial discretion limited only by the supervision of the clinical professor (although they do try to "align [their] plea offers, etc. with plea offers [the district attorney's] would give."). Email from Ric Simmons to Mary A. Lynch and Jennifer Tromblee (Jan. 10, 2005) (on file with author). The main difference between PACE and Ohio is that Ohio does not use a model in which students are team-taught by prosecutors and clinicians.

[98] Professor Merton discusses the work of the clinic and the provocative issues which arose in one case. *See* Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put that Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997 (2000).

students might offer an accused batterer a lenient plea with no jail time in contradiction to the wisdom of the domestic violence community or the wishes of the victim.[99] Professor Merton saw that as a necessary part of the clinical experience.

The Pace model offers many advantages. Students handle whole cases and are supervised by a collaborative team of a professional prosecutor and a professional reflective practitioner. Students presumably benefit from more direct supervision, feedback and reflection opportunities than in a traditional field placement. At the same time, students share in a public interest mission around the issue of domestic violence and battered women. Administratively there are benefits as well. Students work on an appropriate level of cases (misdemeanors) and an appropriate number as assigned by the professor/prosecutor teachers. The clinical professor does not become overwhelmed by the caseload because of the collaboration with a full time paid practitioner. The prosecutor-supervisor is provided time to truly supervise and mentor.

If one's teaching goal is to replicate as much as possible the advantages of the in-house clinical experience, then the Pace model, to my mind, is nearly ideal. Its chief disadvantage is that very few law schools will have the opportunity to create such an arrangement. Many law schools or their clinical programs simply do not have the endowment or the budget to add on the salary of an ADA to the program without cutting back on other essential costs or programs.[100] Thus, although Pace's model appears to be ideal for their circumstances, and certainly aspirational, it simply is not practical for many schools.[101]

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[99] *See generally* LUNDY BANCROFT, WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN (2002) (concluding that batterers abuse because society lets them and because they get more from other people when they inspire fear).

[100] That is not to say that we clinicians shouldn't continue to advocate for more of the law school budget pie and propose such arrangements when the political timing is ripe.

[101] In addition, as discussed *infra*, turning over decisionmaking is a different issue for larger district attorney's offices. The Manhattan (New York County) District Attorney's office is one of the largest, and is frequently referred to as the premier D.A.'s office in the country. "Growing up in Manhattan, I had seen the

2. Brooklyn: Clinical Professor and Students Become the Prosecution on Selected Cases[102]

Although it was organized in the reverse of the Pace program, Brooklyn Law's model contained many of the same advantages as the Pace model. Instead of the prosecutor coming to the academy, the academy went to the Brooklyn District Attorney's office[103] and provided a full-time faculty member to supervise students on cases from the office. Like the Pace mod-

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New York County District Attorney's Office—the Manhattan DA—cited as perhaps the most competent and honest state prosecutor's office in the country. The office had a reputation for giving its members wide leeway in exercising discretion, and faced with a deluge of crime there was reputed to be no time for pursuing dubious charges." HEILBRONER, *supra* note 8, at 15. The office employs more than 550 assistant district attorneys and investigates and prosecutes approximately 130,000 criminal cases a year, many of which are misdemeanors. The District Attorney, Robert Morgenthau, has been District Attorney since 1975 and up until this year ran a practically uncontested race every year. Fear of "backlash" on a relatively insignificantly small number of misdemeanors is not a likely concern. David Heilbroner quotes his deputy bureau chief as saying: "For the first year, no one cares about what you do. You're only dealing with misdemeanors." *Id.* at 21. To lend an assistant to Pace for a year, receive a budgetary break in the salary of the assistant, know that the cases will get the kind of attention which clinic students provide and which generally is not provided by misdemeanor assistants would appear to become a win-win situation for everyone.

[102] Two other law school models similar to that used in Brooklyn are the ones used at Montana and Nebraska. Montana's model is described *infra* at note 134. In Nebraska's model, a full time faculty member becomes a specially appointed county attorney who selects cases for students and guides students on all aspects of the prosecution, including exercise of prosecutorial discretion. Email from Alicia B. Henderson, Associate Clinical Professor of Law, University of Nebraska-Lincoln to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Jan. 14, 2005) (on file with author) (responding to survey sent by author). Students perform all their work out of the district attorneys office. *Id.* Although this model provides extensive opportunities to students, it does make it difficult for the faculty member to be integrated with the rest of the in-house program and the law school and it does not provide opportunities for prosecution students to learn from other in-house students and faculty.

[103] Brooklyn also runs a prosecutor clinic in conjunction with the United States Attorney's office of the Eastern District of New York. Professor Caplow describes that clinic as a "hybrid" since "AUSA's supervise and teach the class but they have agreed to be more involved than the typical fieldwork supervisor." Email from Stacy Caplow, Professor of Law and Director of the Clinical Education Program, Brooklyn Law School to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Dec. 14, 2004) (on file with author).

el, the students were sworn in as special assistants and were provided with a caseload. The clinical professor designed the curriculum and student opportunities. An experienced former prosecutor, and also director of the Brooklyn Law School clinical program, Professor Caplow and her students proceeded to work on the cases as the lead prosecutors without much interaction or oversight by prosecutors.[104] She found the clinic to be an excellent experience for students.[105]

I saw great value in the Brooklyn Law model as well. However, the Brooklyn Law model was possible, I think, because of the confidence the district attorney's office had in it's former colleagues, first Professor Caplow and then Professor Lisa Smith,[106] who now directs the clinic. My situation–and that of many other clinicians–is different. Some may come out of defense practice and have to address perceptions of bias.[107] Others may not have practiced as either a criminal defense attorney or a prosecutor. In fact, even though I was a former prosecutor, I was not a prosecutor from a *local* office and to make matters worse, my former experience was from *down*state.[108] The experience my colleagues and I had with the field placement program led us to believe that the local district attorney's offices wouldn't simply hand over a caseload to me.

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[104] *Id.*

[105] Caplow discusses the clinic a bit in her article, *supra* note 2.

[106] Lisa C. Smith is an assistant Professor of Clinical Law at Brooklyn Law School. She is the former Executive Assistant District Attorney for Domestic Violence, Sex Crimes and Child Abuse in the Kings County (Brooklyn) District Attorney's Office.

[107] Professor Michael Millemann taught and co-supervised a Baltimore City Child Abuse Prosecution Clinic. *See* O'Sullivan et al., *supra* note 23, at 154 (discussing Professor Millemann's experiences with the clinic). In a discussion with the author, he noted that the fact that he is an "aggressive criminal defense lawyer" and does capital cases in the same jurisdiction in which he taught the clinic was an issue with the supervisors of the prosecutor with whom he worked. Millemann, *supra* note 92.

[108] This upstate/downstate distinction does not only apply to cultural assumptions as discussed *supra* note 12, but also in the fear that what works for a Manhattan jury would not work upstate. On the other hand, local prosecutors were always very respectful of the fact that my former office was known to have a program/process for really "training" its district attorneys.

I suspect the reluctance of the district attorney's office to turn over control may be problematic in other localities as well.[109] Most of us whose law schools are located in smaller cities and/or rural areas know how tough local politics can be.[110] Many non-spectacular local trials, even at the misdemeanor level, are covered by local newspapers and television. There is more scrutiny over decisions made by prosecutors in everyday cases because there is less anonymity for victims, witnesses, defendants and their families. Local people usually know someone connected to cases – law enforcement, jurors, court personnel, jail personnel, or teachers of kids connected to cases. Thus, prosecutors generally demand more control over cases and are not inclined to simply hand over part of the misdemeanor caseload when they will be held responsible in the media for any perceived unfairness.[111]

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[109] Although in some overburdened counties, perhaps students and their instructors would be seen as cheap labor and welcomed to handle a caseload. In contrast to the actions in larger offices, however, I would be surprised if in most smaller district attorneys offices extreme limits were not put on the exercise of prosecutorial discretion as to charges, pleas and sentences. *See generally* HEILBRONER, *supra* note 8.

[110] *See* Peggy Tonon, *Beauty and the Best—Hybrid Prosecution Externships in a Non-Urban Setting*, 74 MISS. L.J. 1043 (2005). Although every year, ALS sends students to the Manhattan District Attorney's office and other large urban prosecution offices for summer or permanent jobs, many of our students face a dramatically different experience as prosecutors in local offices.

[111] In fact, over the years district attorneys have had concerns about students in our field placement program. One county's former district attorney said "he didn't want students in the office." He told me at one point that not only were they annoying but that they would be "checking over" and "second guessing"what the office was doing. Another former district attorney demanded that all case files pass through his public relations person—this included certain misdemeanors—before an offer was made. Of course, we have reverse situations as well in which the district attorney's office wants to just throw students alone into night court in distant town courts in order to relieve overworked assistants.

3. Albany: Coordinating with the Community, the Courts and Clinical Alumni[112]

For the Albany clinical program, a more collaborative model was needed with a practitioner/partner who would love the idea of this project and this kind of teaching and a criminal justice and advocacy community that would provide broadly based support for an organized focus on domestic violence pros-

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[112] Other law schools also use models which partner prosecutors and clinical faculty to share supervision of students. For example, at New Mexico, the clinical professor teaches the classes and accompanies the students to court fifty percent of the time. Email from Lisa Torraco, Visiting Assistant Professor of Law, University of New Mexico Law School to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Dec. 3, 2004) (on file with author). At Stanford, the fulltime faculty member prepares students on cases, observes students in court and "arranges for prison tours, police ride alongs and discussions with ex-inmates, defense attorneys and police officers." Email from George Fisher, Judge John Crown Professor of Law, Stanford Law School to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Jan. 10, 2005) (on file with author). At Boston College, Evangeline Sarda teaches a hybrid prosecution clinic in which she supervises "students case prep out of court and []in court" when she has no conflicts in scheduling. Email from Evangeline Sarda, Associate Clinical Professor, Boston College Law School to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Nov. 18, 2004) (on file with author). Minnesota offers several prosecution opportunities. Beverly Balos teaches a hybrid domestic assault prosecution clinic in which she primarily teaches the classes (she co-teaches some classes with prosecuting attorneys) and meets with the students to "discuss the cases, theory of the case, strategy, evidentiary questions etc." Email from Beverly Balos, Clinical Professor of Law, University of Minnesota Law School to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Nov. 18, 2004) (on file with author). She also meets with them to review and discuss drafts of their trial briefs while "the final trial brief and the in-court appearances are supervised by the prosecuting attorney." Stephen Simons's prosecution clinic at Minnesota utilizes more of a traditional field placement model with some creative matching of criminal defense attorneys and students with prosecuting attorneys and students for skills simulations. Email from Stephen M. Simon, Professor of Clinical Instructor, University of Minnesota Law School to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Jan. 10, 2005) (on file with author). He also utilizes "student directors in prosecution" to obtain and assign prosecution cases to students. Email from Stephen Simon, Professor of Clinical Instruction, University of Minnesota Law School to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Nov. 19, 2004) (on file with author); see also *supra* note 108 and accompanying text (discussing Professor Millemann's clinic at Maryland); Larry Cunningham, *The Use of "Boot Camps" and Orientation Periods in Externships and Clinics: Lessons Learned from a Criminal Prosecution Clinic*, 74 MISS. L.J. 983 (2004) (describing his redesigned Texas Tech clinic).

ecution. By collaborating with community organizations, court personnel and the district attorney's office, pieces of a hybrid model came together.

a. Principal Participants

The teaching team includes a "philosopher-lawyer"/faculty member[113] to encourage institutional critique and critical reflection, and provide the kind of supervision, planning opportunities, evaluation and feedback that most field supervisors are too busy to offer consistently. The next key design component is finding the appropriate prosecutor with whom to work, and from whose caseload the students learn and practice,[114] the mentor/supervisor idealized by Liz Ryan Cole. In other words, one needs to find *expert practitioners* selected for "excellence, their experience, their love of their work, and their passion to convey what they know to others."[115] This is the most difficult part of this hybrid model. As Larry Cunningham points out in his article on "boot camps," prosecutors are busy and

> do not have the time or resources to train students extensively . . . Criminal prosecution, particularly at the misdemeanor or petty violation level , is a highly technical, procedure-focused and routine practice. Junior prosecutors typically have a volume practice, where they handle many cases over a period of time . . . .
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> No matter how generous and understanding a field supervisor may be, the fact is that interns are more of a burden to the supervisor than an asset.[116]

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[113] *So Shall You Reap*, *supra* note 14, at 534.

[114] The co-teacher/field supervisor is carefully selected as someone who is expert on D.V. prosecution, a good teacher, and willing to take professional time to accommodate the educational goals. Note, this a difficult part of the proposal as explained *infra* at note 117. One way we found to compensate our ADAs was to find money to fund them as adjuncts through ALS and/ or grants.

[115] Liz Ryan Cole, *Training the Mentor: Improving the Ability of Legal Experts to Teach Students and New Lawyers*, 19 N.M. L. REV. 163, 164 (1989). For a more detailed discussion of this article, see Blanco & Buhai, *supra* note 20, at 617-18.

[116] Cunningham, *supra* note 112. Professor Cunningham also notes the need for

It is important to find someone who is a good co-teacher, allows students to exercise discretion on her cases, and who is comfortable working with a clinical faculty member. Contacting alumna of the school who worked in key prosecution positions eventually led me to my partners.[117] In addition, under this model which focuses on a specialized caseload in domestic violence, it is equally important to find someone whose view of prosecution allows for introduction of a wide range of information and perspective to students, particularly in the area of social science and the dynamics of domestic violence. Although the prosecutor and the advocates may differ over the wisdom of some of the district attorneys office policies and decisions, those tensions make for fabulous teaching moments.

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having teachers prepared to learn from their busy field supervisors. Particularly, at the misdemeanor level, students can be confused or alienated by the highly technical procedure, jargon and swift pace–or worse just learn the administrative bureaucrat-speak without fully understanding what's happening in a case.

[117] My first partner (2000-2002) and second partner (2002-2004) were interns in the field placement program years before and wanted to provide the next generation with ample opportunity to explore decision making and to get into court. When we discussed my ideas over the phone or in lunch meetings, I could sense they had the good non-interventionist and mentoring instincts of a clinical teacher and passion for this project. I also determined that my partners view of domestic violence prosecution and reputation in the domestic violence community would enhance the project. In an informal email discussion with me about the importance of finding the right partner, Professor Michael Millemann noted:

> Good working relationship with prosecutor is essential. We agreed on what students would do; talked regularly about the students and their work, and in those respects, about the cases as well; worked hard to avoid, even unconsciously, undermining each other; identified our views about substantive matters, e.g., about charging, sentencing, disclosure/discovery, recurring ethics issues. Where we agreed, we taught, me in the classroom and she in her working relationships with the students, with our common views. When we disagreed, we identified our positions with each other, disclosed the arguments we would make, and taught with the disagreements. We co-taught a few classes, including in this way. This requires trust, full prior disclosure (no got-ya advocacy), and both real and demonstrated mutual respect.

Email from Michael Millemann, Professor, Baltimore City Child Abuse Prosecution Clinic to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Nov. 18, 2004) (on file with author). I could not say it any better.

Finding a good specialized prosecutor with whom to collaborate does not resolve all issues and problems. An important part of the design is to negotiate strategic cooperation of the "Top Dog"—the district attorney—so that students are able to perform a full range of prosecutorial activities on cases. The ability to control the caseload, and the allocation of prosecutorial discretion, can be delicate issues of negotiation.[118] In my negotiations with the district attorney's offices, I emphasized the need for our students, once trained by my partner and me, to be able to handle cases alone, conduct plea negotiations, hearings and trials. The result was that although our students would not have the kind of discretion that Pace and Brooklyn students had, as long as my partner, the specialized domestic violence prosecutor, "okayed" what the students were doing, the district attorney would not oppose.[119]

The other "teachers" under this model are the advocates, the court, and the other policy makers involved in fashioning the court. Thus, it is helpful to reach out to them for support of the involvement of students and for ideas of training for students. This is not to suggest that all parties agreed about how to prosecute domestic violence crimes or how to fashion the court.[120]

The story of our collaborative is probably typical. Predictably, each player pointed to "failures" in other parts of the system. The police complained about the prosecutor not communicating with them and lack of equipment, while my prosecutor-partner pointed to lack of staff and resources and to poor evi-

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[118] I wanted my students to appear in court on cases and at hearings and trial as much as possible. I also knew that there had been inconsistent opportunities for such activities in our field placements at that office. Over the years, I met with each district attorney and was able to promote the idea of ALS students assisting my partner-prosecutor in staffing the court.

[119] In the initial county in which we worked, I signed a confidentiality agreement, as did each of my students. The district attorney required victims' consent to students prosecuting, but agreed to allow my partner-prosecutor to abide by the educational parameters of the program.

[120] In one county, I often became an intermediary between the district attorney's office and the domestic violence advocates when they misinterpreted each other's jargon or viewpoint.

dence recovery by the police. Advocates complained that the courts and the prosecutors ignored the voice and experience of battered women and domestic violence advocates. Lack of resources, lack of coordination and distrust among players was a pervasive problem.[121] Nevertheless, and with varying levels of ambivalence, this community coalition moved forward to work together to design a court and to apply for joint funding for additional resources. Most importantly for the educational project, the idea of having well-trained law students work with criminal victims, staff the court, and prosecute certain domestic violence crimes under appropriate supervision was warmly accepted by all the parties. The design of the court and my clinical program began in tandem.[122]

b. Educational Parameters

In addition to the organization of the teaching team, the course itself is structured in order to achieve the goals described earlier. First, the clinic is offered as a year-long course to allow for building of skills, achievement of more goals, integration of different methods of instruction and increased opportunities to practice and reflect. The year-long commitment allows students to build skills and knowledge, and supervisors to obtain confidence in the students' abilities.[123] It increases the likelihood that students see cases through to verdict or plea and sentence, as well as the likelihood that students engage in

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[121] This distrust and tension can be viewed as fertile teaching material with opportunities for guest seminars by a number of professionals to broaden student perspective on the project. I also recognized it as a good beginning for reform; problems and lack of communication must be named before attempts to remedy and change can occur.

[122] The criminal court judge was excited by the idea of having students help staff the court and work to better prosecute the cases. He agreed to schedule court on Fridays, which would work best with student schedules. Thus, students would be assured of a steady stream of domestic violence cases coming from the court.

[123] For a detailed discussion of clinical design, see Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277.

the full range of prosecutorial duties[124] including hearing and trial opportunities.

Second, "clinical methodology" is used by the full-time faculty member, the field supervisor and students.[125] Students and the faculty team utilize planning documents and reflective learning skills. Students are evaluated and given letter grades under our in-house clinic grading system which emphasizes planning, performing, reflection, ethics and team building.[126] Students' performances during simulated exercises and during victim interviews, trials, hearings or court calendar calls are observed in most cases by both the in-house clinical faculty member and the prosecutor-supervisor, and immediate feedback is provided.

Third, students enroll in a weekly two hour Domestic Violence Seminar as a co- or pre-requisite so that students can be steeped in the special issues and special knowledge of the dynamics of domestic violence[127] and of the development of laws pertaining to domestic violence.[128] In this course, domestic

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[124] Professor Cunningham points out that the "quicker students learn the procedure and language of misdemeanor prosecution, the quicker they can learn and practice the more important skills and values such as making charging decisions, deciding on plea offers, and trying a case to verdict." Larry Cunningham, *supra* note 113, at 1001-02.

[125] Clinical methodology jargon has become "mainstreamed." At the ALS Clinic Holiday party this year, Professor Joseph Connors created a clinic jeopardy game in which the category of "Clinical Methodology" included answers such as "active listening," reflection opportunities, and "cultural competence;" "Bellow and Moulton" was also an answer.

[126] For a detailed description of the evaluation process for the Domestic Violence Clinic, see *The Evaluation Process*, at http://www.als.edu/faculty/mbreger/evalprocess.html (last visited Apr. 20, 2005).

[127] It has been accepted that the general lay-person is still ignorant about this issue and that so many myths and stereotypes surround domestic violence. Indeed, that is why expert testimony is needed in courts. *See generally* Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67 (1998). There has also been an emphasis in law schools to train students in handling domestic violence cases. *See generally* John F. Mahon & Daniel K. Wright, *The Missing Ingredient: Incorporating Domestic Violence Issues Into the Law School Curriculum*, 48 ST. LOUIS U. L.J. 1351 (2004).

[128] The Albany Law School Course Catalog explains that the Domestic Violence Seminar "[e]xplores in depth the legal issues and discrete phenomena of domestic

violence advocates and policymakers, survivors, health professionals, and law enforcement personnel share their interdisciplinary perspectives on the issue of domestic violence and the history and development of domestic violence law-both civil and criminal.

Fourth, the "clinical class component"[129] consists of some front-loaded instruction, courthouse tours/observation sessions at the beginning of the first semester, and a two hour weekly session throughout the rest of the semester.[130] During the first semester, students read about pertinent statutes and skills needed to engage in domestic violence prosecution and receive lectures/problems on procedure. In addition, students read codes, cases and articles discussing professionalism, ethics, and institutional critique of prosecution policies and approaches. They also perform case rounds.

Fifth, a closed case of the prosecutor-supervisor is used as the basis for a series of simulated activities and assignments including simulated victim interviews, plea negotiations, court calendar calls, bail hearings, and to draft simulated charging documents and memoranda to a "supervisor" analyzing the facts, evidence, and applicable law and recommending how to proceed with the case. Given the other goals for class, class time generally is used to teach about the skill and each student arranged for one-to-one time with the faculty-member professor to conduct the simulations and receive feedback. Both simulation and feedback sessions are videotaped so the prosecutor-teacher can review and comment if s/he disagrees and to observe student progress.[131]

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violence. Topics generally include intimate partner violence, criminal prosecution of batterers, child abuse and neglect, gay and lesbian battering, elder abuse, and the basis for intervention of the state." *Albany Law School Course Descriptions*, *at* http://www.als.edu/academics/course-listings.cfm?ID=5%2E1 (last visited Apr. 20, 2005). This course was also required for Family Violence Litigation clinic students and open to non-clinic students.

[129] *See generally* Eisinger, *supra* note 61.

[130] *Cf.* Cunningham, *supra* note 112.

[131] Since students generally performed very well once prepared, these videotapes provided the supervisor with more information about the strengths of the student. It also provided another opportunity for the faculty member and supervi-

Sixth, the faculty member/philosophy lawyer[132] also assists students in preparation for intensive experiences such as hearings and trials in order to both encourage the practitioners to provide students with more challenging opportunities and to help students excel in performance.[133] After such experiences, students meet individually with the faculty member for reflection and future planning. Students also meet the faculty member at the beginning of the semester to identify educational planning goals, at mid-semester (to listen to student feedback, provide general evaluative feedback to the student and to review/revise goals), and at the end of semester (to review proposed grades and reflective end of semester memos).

Seventh, caseload and/or prosecutorial assignments are selected and parsed for educational value.[134] We purposely linked ourselves to a specialized caseload and restricted ourselves to working at district attorney's offices staffing domestic violence courts.[135] Such courts streamline and organize the processing of such cases and thus reduce the learning curve and "transaction costs" for students.

IV. Lessons Learned from the Albany Law School Experience: Risks, Successes, Regrets and Rewards

The Domestic Violence Prosecution Unit evolved over the past four years to meet student demand, changes in domestic

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sor to discuss needs and goals of students and clinical methodology. Another unintended benefit was that supervisors appeared to become more confident in students and allowed greater latitude on cases after viewing the tapes.

[132] *See supra* note 113 and accompanying text (discussing the "philosopher/lawyer" faculty member).

[133] Practitioner-supervisors often do not have the time to "moot" students or assist students in planning their tasks.

[134] In addition to my conversations with Pace Law Professor Vanessa Merton described earlier, I have also learned that Montana Professor Peggy Tonon finds case parsing, selection and assignment critically important. She has arranged to have office hours at a local district attorney office. While there, she reviews case dockets and files in order to select appropriate cases for her students. Telephone Interview with Professor Margaret A. (Peggy) Tonon, Director for Student Affairs and Clinical Supervisor, University of Montana School of Law (Fall 2004).

[135] There was only one office in the first year.

violence prosecutors and personnel, and my sense of improving pedagogy. For example, it started in affiliation with one district attorney's office. Last year, however, students were working with three different district attorney's offices.[136] The project started as a collaborative teaching effort with one volunteer prosecutor-attorney. Now there is a paid adjunct-partner and networking among and between the adjunct, the other prosecutor-field supervisors, and the clinical professor.[137] As the educational project became better known and the offices became more comfortable with the expertise of the students in domestic violence cases, more opportunities opened up for students; they tried cases, conducted felony preliminary hearings and exercised increasing discretion in plea negotiations and case decision-making.

Over the past four years, we have partnered with different counties, cities and agencies to assist in the prosecution of domestic violence crimes, the creation of other domestic violence courts, and the acquisition of funding to provide better staffing and resources on domestic violence matters. However, not every evolution has been progress. In one case, looking to expand, I overlooked the District Attorney's tendency to treat domestic violence crimes less seriously.[138] I thought the fact that the assistant district attorney who specialized in domestic violence was eager to partner with us was a good enough link. The District Attorney's disdain, however, permeated the working and resource structure of the entire office, resulting not only in ineffectiveness in the criminal justice response to domestic violence but also a less than ideal experience for the student assigned to work in that county.[139]

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[136] Since the Capital Region is easy to traverse, it was convenient enough for me to attend court sessions in the three participating counties.

[137] The Albany Law School faculty approved the clinical course in the spring of 2000. Beginning in the fall of 2000, it has been offered for four years running. As I write this article, I am on sabbatical and, hence, the hybrid project was not offered during the 2004-2005 academic year.

[138] As I explain later, I often felt internal pressure to expand the program to meet student demand or to make sure that the numbers justified the assignment of a full-time faculty member.

[139] That is not to say that working with this office did not offer other kinds of

From reviewing student evaluations and community input, and from my perch as "founder," I see continued success in meeting two original goals. The project brought some of the rich experience and perspective of an in-house clinic to students working on prosecution cases and improved, at least on the cases on which students and advocates worked, the criminal justice system's response to battered women. Along the way, some lessons have been learned which may be of use to others considering a hybrid prosecution project. The lessons divide like a compass into four directional areas: (1) there are risks inherent in the model, (2) the difficult teaching experiences need to be celebrated, (3) know my regrets so you can have different ones, and (4) the rewards *are* worth the effort.

A. Risks of Using a Flexible Partnering Model

Unlike the models utilized at some other schools including Pace and Brooklyn,[140] our model did not require turning all discretion over to the students and the clinic. Instead, it relied on a more flexible approach in which the faculty member partnered with the prosecutor to encourage increased use of students as the lead prosecutor/decisionmaker, but did not require the relinquishment of the partner-prosecutor's discretion as a pre-condition of the project. The partnership also was

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educational opportunities. For example, one of the victims was arrested and kept in jail for failing to respond to a subpoena because the office suspected she would not show up for trial. Her children were thrown into the social services system and the actions made the news. Carol DeMare, *Victim Jailed for Own Safety*, TIMES UNION (Albany, N.Y.), Sept. 13, 2003, at B5, *available at* 2003 WL 59896200 (detailing the events which led up to the victim being jailed). We were able to have both the prosecutor who sanctioned the action come "defend" her decision and have the DV police officer who expressed concern about arresting the victim speak in class. This same district attorney's office was eventually challenged on its drug, community and domestic violence policies, and a candidate beat the incumbent district attorney in the Democratic primary based primarily on lack of response to community issues. *See Mr. Soares' Victory: His Election Should Be a Lesson for Those Who Cling to the Machine Era*, TIMES UNION (Albany, N.Y.), Nov. 3, 2004, at A10, *available at* 2004 WL 88584024 (describing the issues that helped to elect David Soares Albany County District Attorney).

[140] *See* discussion *supra* Parts III.B.1-2 (discussing selection of Albany educational model by describing Pace and Brooklyn models).

intended to provide more consistent and extensive use of clinical methodology and supervision than was typical in our field placement program. However, there are several risks inherent in this flexible approach.

First, choosing a partner is a difficult and risky task. Unlike a traditional in-house clinic in which faculty/staff is determined for the academic year, we were subject to the actions of the outside office which were often unrelated to the academic semester and our needs. For example, turnover of the prosecutor-partner is a significant problem which can prevent the kind of teacher development that is ideal.[141] Student work and much domestic violence work mostly involves a misdemeanor caseload. Experienced assistants are often lured away from the domestic violence misdemeanors by offers of more senior positions with more resources and less hassle. Felonies simply have more prestige within the criminal justice world. In fact, over the course of four years of working with one particular office, at least five different prosecutors rotated out of the assignment to the domestic violence court.[142]

Another lesson concerned the characteristics of a good partner when specializing in a particular area of prosecution, and my assumption that someone who had worked in this area for years would be more likely to be an ideal candidate. My initial instinct had been to work with the senior prosecutor of the "Special Victims Unit."[143] I assumed that someone in that position must not only be an expert in domestic violence but must be enthusiastic about the social science of, and the feminist perspective on, domestic violence. However, this is not

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[141] In the first year of the project, internal employee turmoil within the district attorney's office threatened us with the loss of our co-teacher. In the end, fortuitously, we kept the services of the co-teacher, who was promoted to head a newly formed domestic violence unit in the office.

[142] The prosecutor assigned to staff the DV court was not necessarily my co-teacher/partner. It would be that caseload, however, from which we worked.

[143] Terminology in some local district attorneys' offices for units that handle sexual assault, child abuse and/or domestic violence cases. As the chief of the "Special Victims Unit," this prosecutor was responsible for assigning domestic violence misdemeanors to other assistants and was, and is, a loyal alum. My initial hope was that she would assign cases to us just as she would to other assistants.

always the case. One special victims prosecutor, for example, also handled child abuse, sexual assault, and other "special victims" cases. Domestic Violence advocates warned me that her heart lay with the child abuse and sexual assault cases and they perceived her to be judgmental about battered women with children in the home. When I spoke with the prosecutor in greater depth about the project, to her credit, she was completely candid with me. After further discussion, she concluded that she lacked both the passion and time for the domestic violence project I envisioned; she admitted that she was "burned out" from "dealing with domestic violence victims."

Another risk concerns the conflict between asking students to be partnered with a specialized prosecutor to do justice while at the same time, asking the students to be institutional critics in community reform. Earlier I alluded to my mistake in expanding the program into an office not known for its utilization of a community-based approach to domestic violence. It was in that context that one student became troubled by the conflict between what she learned at the office and what she learned from the clinical professor and other "teachers." The activities of the prosecutor, with whom she was learning about the hotseat of real life prosecution, were being seriously questioned in the domestic violence seminar by domestic violence experts, in the news by our advocate-partners in the battered women's community, and in the clinical class component by the clinical professor and other clinic students.[144] The student appeared to be flustered and very defensive in class and in one-on-one sessions. She eventually requested faculty permission to drop the course midway through the year—albeit for other logistical reasons.

An alternative risk is that in attempting to avoid the kind of difficult tensions this student encountered, the clinic can fail

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[144] Hopefully, the hybrid project blended the hotseat experience of prosecution with the "hot-house" of an in-house clinic. *See* Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123, 133 (2000) (describing how "in-house law clinics are alternately praised and damned for their 'hot-house' character").

to truly perform institutional critique or thoughtfully engage in a theoretical analysis of the subject matter area.[145] I wonder if at times, rather than bringing cross-cultural ideas, new models, and other perspectives to enhance the dominant view held by those in the district attorney's office, the students and I may instead have become pulled into their culture. This risk stemmed from two factors inherent in the model: (1) we genuinely liked our prosecutor-partner and felt sympathy for the difficult position assistant district attorneys found themselves in, and (2) we first learned of the domestic situations, not from victims—or even defendants—but from police reports which certainly colored our view of cases.[146]

There were risks in the community as well. Sometimes, the domestic violence advocates would trust the district attorney's office or give them a benefit of the doubt because of the clinic's reputation or work. Were we inhibiting a more vigorous attack on that office? Or, I suppose, the students might have been exploited for other political purposes.[147] If some or any of this happened, it was not observed by me to any significant extent.[148]

In addition, there were potential conflict issues with our Family Violence project. Would we have to identify a conflict of interest with every potential family violence client who had a criminal matter in the counties in which the prosecution project operated? That is not what we concluded and instead came

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[145] I am cognizant that this statement flies in the face of my earlier attempt to not divide the world into objective and subjective ways of thinking. *See supra* note 4 and accompanying text. My only defense is that I went to law school and teach at a law school. As a result, I am not immune to the law school's cultural reinforcement of those distinctions.

[146] We were subject to the critical effects of primacy. One can overcome that by spending a lot of time with the victim or advocate, becoming knowledgeable about the dynamics of domestic violence, and by listening with an open ear to the defense perspective.

[147] We did not encounter the problem of students being assigned inappropriate tasks as cheap labor. I believe this is because of the partner model in which the clinical faculty member was intensively involved.

[148] I did observe, however, that some government agencies/actors became more focused on the "budget relieving" opportunities of the grant funding and less focused on truly changing the system as it existed.

up with a way of addressing the issue internally, with clinic clients, and with the selected offices.[149] Although we cannot know if there were potential clients who distrusted the clinic's relationship with district attorney's offices and hence failed to access assistance from the clinic's Family Violence Project, that project's reputation seems fairly untarnished by its proximity to the prosecution project.

B. Celebrate the Difficult Moments and the Inherent Tensions-They Are Often the Best Teaching "Text"[150]

The attempts to integrate characteristics of an in house project were successful in many ways. Concerning professionalism, students were exposed not only to the codes and obligations but to the reality of activities such as disclosing material to the defense or trying to effect the prosecutorial ethical mandate to "Do Justice" in a case in which the victim wants the charges dropped. Not that these lessons were learned in a beautifully orchestrated manner. In fact, it was just the opposite.

For example, early on in the project, one student lost contact with the victim, so "taking some initiative" as we encouraged in our fact investigation teaching, she decided to leave a message at the defendant's home in case the victim had gone back to the defendant. When she announced this to me in a mentoring session, it was all I could do not to fall off my chair and shout "You did what?" I know I wasn't at my best in handling this teaching opportunity. I'm sure I looked upset and concerned and I can't promise that my voice was calm. I did manage to ask her what she thought might happen to the victim if the defendant/batterer deduced that the victim was cooperating with the prosecutor. I reminded her about our discussions of victim safety. Also, I asked what she had learned in her professional responsibility course about the prosecutor

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[149] *See infra* note 156 and accompanying text.

[150] *See* Peter Jaszi et al., *supra* note 87, at 404 (describing how "[s]tudents bring their field experiences back to the law school as the 'text' for critical analysis").

talking with the defendant/opposing party who had counsel. She informed me they "hadn't gotten to that yet" in her ethics course. We quickly called the prosecutor-supervisor and the domestic violence shelter to report what had happened. Unnerving as that experience was for the student and for me,[151] the experience was memorable for the students and the class and led to much discussion of safety of victims and obligations of prosecutors in fact investigation.

In terms of skill-building opportunities, the hybrid project did provide students the anticipated numerous integrated learning experiences with progressive skill-building and reflective opportunities. Students were able to focus on self-identified goals under structured and direct supervision of a clinician. They were more involved in cases and were offered more independence on cases than the typical prosecution externs I had supervised. Students appeared in court weekly, interviewed and worked with more victims, negotiated more pleas, and prepared for more hearings and trials than those not working with the project.

Once again, this didn't always happen in the perfectly organized chorus line of the simulation course syllabus. Early on in the semester, a case no one expected to go to trial was suddenly set for trial. The assigned student was a second year student who had yet to complete a course in either evidence or trial advocacy.[152] The other students, my partner, and I all worked feverishly with her but when the student was mooted, it was clear to everyone that she just wasn't ready for the complexity of a trial on what had turned into a very complex and difficult case early in the first semester of her second year.[153]

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[151] I mentally kicked myself a hundred times for that incident – had we failed to properly prepare the students? Fortunately, once we discovered that the victim had not been harmed as a result of the call, my "kicking" soon turned into the healthier reaction of analyzing how to better prepare the students in the next year.

[152] In the clinical class, we had only gotten as far as bail offers and plea negotiation.

[153] In addition to other complexities, this was a case (typical for domestic violence) in which we were not quite sure what the victim would admit or deny on the day of trial.

She stepped back from the case. However, we ended up using the case as a simulated one for the second semester and had all the students prepare it. It was a great exercise and became more meaningful as a simulation because the students had experienced the ways in which witnesses disappear and contradict themselves and facts change without notice. They also had experienced the "panic" of attempting to prepare for trial on that case and brought that motivation[154] into their class preparations and simulated exercises.

As in true clinical form, it is impossible to control all the factors which affected the educational model. For example, as we planned our modest little city domestic violence court in Troy, New York, little did we know that the Chief Judge of our highest court was about to announce a pilot project for the region in which family and criminal matters would be heard almost all at once. One of the locations for the court was New York State Supreme Court in Troy, New York.[155] Suddenly, the Troy city criminal court was thrown in confusion, our co-teacher was re-assigned out of the city court, a new assistant was hired, and all was in flux. This sudden chaos put my "flexible planning" and "rely on a good partner" approach to the ultimate test. It was a terrifying prospect at the beginning of the second semester of a year long clinic. It turned out to be a thrilling opportunity and teaching moment. The opportunity now presented itself for us to work more closely with our family violence colleagues who were to represent clients on family matters in this new integrated criminal/civil domestic violence court. We were able to plan joint skill training exercises, to have family violence clinic students learn from our prosecution students, and *vice-versa*.[156] By broadening our goals and

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[154] *See supra* notes 13-14 and accompanying text.

[155] In New York, the Supreme Court is the trial level court, not the state's highest court. DAVID D. SIEGEL, NEW YORK PRACTICE § 12 (3d ed., St. Paul, West Publ'g Co. 1999) (1978).

[156] We also had to be even more careful of conflicts, so we set up a system in which my clinic students put the victim and batterers name through our conflict system. In addition, my colleague and her students in our family violence project informed all of their clients about our project and had them give informed con-

teaching approach, we were able to change the range of cases for students to include both felonies and misdemeanors, to teach students to handle cases in city court and assist on the cases in supreme court, and to work with a number of primary and secondary supervisors. By the next year, we were able to open up more student opportunities. By responding in an inclusive and positive way to changes (and there were personnel "adjustments" almost every year) we were able to provide more students with wonderful experiences.[157]

With respect to integrated learning and thinking, students were able to come to informed opinions about issues such as mandatory arrest of batterers, use of prosecutorial subpoena power to force victims to testify, and whether and how to consider victim's requests to excuse batterers in determining plea, dismissal and/or sentence offers. They had not only learned the law and procedure well, they were able to theorize about it and had acquired the skills to actually practice well under those procedures. In the end, the most beneficial learning experience was handling the unexpected exigencies of real practice, observing their work have a real effect on real cases and real human beings motivated students to excel.

C. Regrets : Couldn't We Have Done It Better? Couldn't We Have Done More?

My main regret was that I couldn't figure out how to consistently offer enough opportunities for students. Unlike our field placements which broadly offer at least twenty five prosecution placement opportunities in four or five different offices, I only offered this opportunity to four students in the first experimental year. Of course, the domestic violence seminar was open to all students and generally averaged around twenty students. In later years, as the hybrid clinical program expanded to work with other prosecutors and linked to other domestic

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sent to representation. Furthermore, we make it a practice to inform the prosecutor-teacher of cases to avoid assigning to prosecution clinic students.

[157] *Cf. infra* Part IV.D (discussing the potential rewards of clinical educational projects).

violence courts, it was able to accommodate more students. However, given how strictly I constructed the parameters of the project and how much I tried to replicate an in-house experience, it could only serve an average of six students. The primary limitation was finding willing and appropriate prosecutor-partners. When I did expand the program into several counties in an attempt to find more willing partners and an appropriate level of case activity, I played more of a facilitator role and somewhat less of a role as direct case supervisor.[158]

Upon reflection, if I had been more comfortable with a broader view of grading and evaluating, and more confident in articulating that view when proposing the course to our curriculum committee, I would have been able to be more flexible in my choice of partners. Since students were graded according to the same rubric as our in-house students,[159] fairness required, to my mind, providing approximately similar opportunities in the differing counties and equally involved prosecutor-partners.[160] In the last year of the project, when last minute changes in district attorney personnel resulted in two new prosecution partners/supervisors and it was unclear to me that I could appropriately negotiate the caseload and opportunities in one office, I taught the project as a pass/fail field placement course. Of course that presented all the problems that occur when clinical programs are ungraded, including I think a feeling by the students of being asked to do too much for simply a "P."

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[158] During this time of expansion, it appeared to me that the clinical project lost some of the "battered woman advocacy perspective." In addition, I sensed the students became more annoyed with my "critical" philosophy-lawyer role when I was not as involved in their cases.

[159] At Albany Law School, field placements students are graded pass/fail and students in in-house courses are graded on four major areas: Pre-performance Skills/Planning, Performance Skills, Post-performance Skills: Correction and Reflection, and Professional Responsibilities. *See The Evaluation Process*, *at* http://www2.als.edu/faculty/mbreger/evalprocess.html (last visited Apr. 20, 2005).

[160] I also felt responsible to personally observe as much student activity as possible. I know that not all clinicians agree with this view of grading and would argue that clinical grading should be based on planning and reflection more than performance.

In retrospect, I should have developed a separate grading rubric and approach for the hybrid project and requested the faculty to approve the course as different from both our in-house and field placement program—as a true hybrid. From the rich resources written about designing field placement clinics, one can more flexibly consider the "dynamic and fluid task [of design] in which students' desires, the placement agencies' needs and work, and the law school's evolving curriculum must be coordinated and adjusted with one another."[161] Clinical scholars have identified a variety of educational goals for field placements such as "exposure to law practice," skills training, "assumption" of lawyering roles, "acting professionally," learning to learn from experience[162] and institutional critique and have documented the challenges in meeting these goals.[163] Because of its emphasis on replicating as much as possible the in-house model, the Albany model underestimated the value of other goals found in the field placement tradition and the additional opportunities available when broadening the goals.

Another regret is that I didn't work on more of the interdisciplinary initiatives that could have enhanced the project. Students did participate in theoretical discussions and reflective critique about law/social science, using the clinical experience to enhance the domestic violence seminar and the seminar work to enhance the clinical learning and practice.[164] However, the project could have benefitted from a more structured collaboration with a social scientist and her students. With such collaboration, the clinic may have been able to perform statistical research on the effectiveness of the domestic

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[161] *See So Shall You Reap*, *supra* note 14, at 527.

[162] *See generally supra* note 15.

[163] I find Linda F. Smith's article, *So Shall You Reap*, *supra* note 14 and Eyster, *supra* note 20 particularly helpful in thinking about clinic design. For a more recent update which thoughtfully evaluates contrasting models of supervision, oversight and training, see Blanco & Buhai, *supra* note 20.

[164] When domestic violence advocates, health professionals and policymakers came to sessions with ideas from other disciplines, they became resources for the students to use in working on their cases. Our students' experiences and hypothetical descriptions of their cases also became fabulous discussion material in the seminar.

violence court initiatives which would have been an ideal interdisciplinary learning experience for the students, helpful to the courts, and a wonderful research and scholarship opportunity for the faculty.[165]

A final regret is that the project did not achieve any significant "rebelliousness."[166] What happened to my desire for a "rebellious" versus "regnant" design? Remember my hopes that the new court in Rensselaer County

> should "come out of an attempt to 're-imagine' social arrangements so that the women who encountered domestic violence along with their shelter domestic violence advocates would be the primary problem-solvers in determining prosecutorial decision making . . . .it would grow from the needs of the local community members and be heavily influenced by the wisdom of non-lawyer domestic violence activists"[167]

Ah well, life happened. At first, great things happened. We found funding so that a battered women's advocate was hired to work out of the police station and be available on call to victims. Another battered women's advocate was assigned to the court itself. This had a two-fold effect: (1) victims reluctant to talk to the prosecution were, at least, hooked into services and a support system, and (2) the advocate performed court-monitoring and kept the court "honest."[168] Partners worked

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[165] For a more detailed discussion of the topic, see the work of Professors Suzanne Tomkins and Catherine Cerulli at the University of Buffalo, MONROE COUNTY FAMILY COURT DOMESTIC VIOLENCE INTENSIVE INTERVENTION COURT EVALUATION, MAR. 1999-MAR. 2000 (Suzanne Tomkins ed., Spring 2000) (published by Family Violence Clinic, SUNY at Buffalo School of Law). Our planning for a domestic violence court was an ad-hoc process and although early on I made efforts to systematically evaluate outcomes by reaching out to social scientist friends at a local college, I got caught up in the teaching and other activities and did not pursue such an evaluation. Nor did the court ever pursue a victim evaluation of its efforts, which would have been wise.

[166] As I write this, I am reminded of the humorous words of our Dean and my friend Tom Guernsey to his daughter Allison after her successful organization of an anti-war protest sponsored by Women Against the War to which I belong, "So did they end the war, yet?"

[167] *See supra* Part II.A.

[168] A typical example of proactive and comprehensive victim advocacy occurred

collaboratively on cases and in court; there was energy, coordination and progress. Then, bureaucracies did not continue to appropriately staff the domestic court initiatives. Communication broke down.[169] The domestic violence prosecutor got burned out and joined the homicide unit. The chief district attorney resigned. The city court judge was removed from the bench. That story is for another day.

D. Rewards: Why You Might Want to Consider This Kind of Educational Project

In the midst of writing this article, a former DVPU student and recent alumna contacted me for some career advice. As she learned about this article and the questions it raises about the success of the project, she described what the course meant to her:

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in one case in which the victim first met the advocate at the police station. Together the advocate and victim filed the police report that led to the arrest of the batterer. When it came time for the preliminary hearing to establish probable cause to proceed, the victim was reluctant to testify in front of her batterer. She only agreed to testify after the same advocate answered her questions, and with the agreement that the advocate could be nearby in court during her testimony. Rather than falling apart from lack of victim testimony, the case proceeded. The offender ended up serving jail time, after which he was released on electronic monitoring. The victim remained safe through it all, in part, because of the careful safety planning coordinated by the advocate and herself.

The other kind of intervention occurred when the defendant was present but the victim was not. In such cases, many defendants attempting to obtain a better plea deal lied about victims. Defendants claimed in court, when the victim was absent, that the victim wanted the case dropped, was "luring" the defendant back to the house, or that the victim was crazy. On one occasion, a defendant produced a letter he said was signed by the victim. However, the victim advocate had worked so closely with the victim from the moment the first police report was filed that even though the district attorney's office had not yet heard from the victim, the advocate was able to immediately contact the victim, convey accurate information to the specialized assistant district attorney and reveal the fraudulent nature of the letter.

[169] One source of problems came from the misunderstanding of the roles of lawyers and advocates for battered women. In particular, some government actors perceived domestic violence advocates and lawyers as "non-cooperative" when they refused to betray client confidences.

> I can honestly say that my greatest learning experiences through law school occurred during my time in the law school's Domestic Violence Prosecution clinic. No where else did I have real facts to work with, real situations constantly unfolding, real people behind the facts, and a real reason to care . . . Being part of the clinic also afforded a wonderful opportunity for me because I worked with two clinical professors who could not have been more different than one another except for one thing: their desire to do justice and to teach others to do the same. The professor who is an assistant prosecutor taught the value of straight talk and the importance of being objective. Yet because of her regular duties and her teaching responsibilities, time with her was short and in demand . . . . My trial was something I knew the assistant prosecutor could have handled in her sleep, but for me, it was the biggest and most exciting event in my law school career . . . . .The verdict in this case would be for real and would genuinely impact those persons involved. For the batterer, he faced up to a year in jail. For the victim, this verdict would offer her validation for the abuse no one else seemed to believe, or further reinforce her perception that the "system" worked only to protect batterers.
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> That's where the clinical professor was invaluable. As a former prosecutor herself, Mary knew what we were trying to do—and helped us to actually learn how to do it ourselves as opposed to just telling us how to do it. As I prepared for the trial, I spent hours with Mary, refining the sequence of my direct, going through the evidentiary issues. Those hours were necessary, and because that was her role in the clinic, she was able to give me the time I needed to prepare for the trial.
>
> Nowhere else in law school can a student see such tangible results. Other classes swirl on throughout the semester with no sense of what type of learning was occurring. In those classes, it was not until the final exam grades were posted did I feel I could judge my performance in any meaningful way. However, with the clinic, every day provided another opportunity for self-assessment . . . In case anyone is wondering, I won my trial. It was then, and still is now, my proudest law school accomplishment.[170]

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[170] Email from Lynn Welthy, Albany Law School alumna and clinic participant

Clinicians who teach and direct hybrid prosecution clinics elsewhere also find them rewarding and most agree that they provide students better feedback/supervision and more opportunities for skill building than the typical field placement.[171] Students in such clinics are more receptive to faculty introduction of ideas contrary to the culture and policies of their assigned prosecutor or office. I too found the hybrid prosecution project very rewarding. I was able to balance the project with my other faculty work, family and personal life. I could focus my clinical teaching on the students' case planning, skill-building, and reflective practice, undistracted by a clinic caseload, grant requirements or intake concerns. With less time pressure, I was able to be much more "non-interventive." At the same time, since the students were working on real cases, they were exposed to the dynamic and unexpected situations that come with real victims, witnesses, and judges, versus the less dimensional ones found in simulated courses or hypothetical situations. Thus, our class sessions were much more intense and dynamic than those I taught in the field placement program. This was because I was privy to all the facts of the cases and had observed parts of cases so the students and I shared common experiences.

I was also able to integrate my social justice reform work on domestic violence with my teaching.[172] Despite the eventual break up of the original coalition in one county, the students

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to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Dec. 17, 2004) (on file with author). Ms. Welthy, who was highly honored academically throughout her law school career could have chosen many other moments as her proudest.

[171] While writing this article, I had the opportunity to discuss my opinion by email and telephone with several other clinical professors. "Here are my thoughts about the experiences that I had in developing and teaching (Baltimore City Child Abuse Prosecution clinic): 1) Great learning experience for the students, especially insofar as it allowed the students to participate in exercising prosecutorial discretion, which our students did. This produced some wonderful teaching moments . . . ." Email from Michael Mille-mann, Professor, Baltimore City Child Abuse Prosecution Clinic to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Nov. 18, 2004) (on file with author).

[172] *Cf.* Chavkin, *supra* note 90.

and I experienced a great sense of reward for the work done in the community. First, students made a difference in particular cases. They were able to spend more time concentrating on their cases and in contact with the victim than the average prosecutor or in some cases more time than an advocate could obtain (e.g., cases in which the victim does not identify herself as being in a violent relationship or needing an advocate). Student's work with victims had real and tangible effects on the outcomes on cases.

One case typifies the difference students made. The victim's estranged husband attacked her at a shelter-sponsored apartment, the location of which she had promised not to disclose to the batterer as a condition of living there. The victim was afraid of many things: the batterer retaliating, cooperating with the prosecution, speaking with the domestic violence advocate, and losing her housing. The prosecution student consciously employed tools of client-centered counseling[173] and spent much time in contact with the victim obtaining a full picture of her life.[174] She also linked the victim to a student-lawyer from our Family Violence Clinic, who represented the victim civilly in family court and assisted the victim in finding a divorce lawyer. The two students worked together to assist the victim in facilitating a safe housing situation and repairing relationships with the domestic violence shelter.

In addition, the prosecution student used a "victim-centered approach" to the prosecution of the case. Because of the victim's history of going back to the defendant, there were times when actors in the system interpreted the victim's failure to appear or late appearance as ambivalence. The student knew so much about the client's life—about the nine-month pregnant daughter who needed attention and the boss who would not

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[173] *See generally* DAVID CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK OF LAW SCHOOL CLINICAL PROGRAMS (2002).

[174] The victim was a long-term survivor of domestic violence visited upon her by her husband, from whom she had separated several times only to allow him back in her life again. In the past, she had also been afraid to cooperate because the batterer/defendant had threatened her with his "high-priced" lawyer who, according to the victim, lodged cross-petitions against her in family court.

allow the victim to place or receive private phone calls. Ultimately, the student had such belief in the victim that she did not assume that the victim was "backing out," but empathized with the logistical difficulties the victim was having in attending repeated court appearances and interviews. She convinced court actors to give the victim the benefit of the doubt. The student turned out to be right: the victim cooperated; the defendant was forced to accept a plea; and the victim saw the system work in *her* favor for a change.

Further, the clinic was a positive part of the domestic violence court planning process. Students offered recommendations about procedures for the new court which clearly came from viewing the process through victims' eyes.[175] Because of our ties with local community activists, we were in closer contact with the victim/victim-advocate perspective and were able to lend support to their suggestions and recommendations. In addition, because we were assisting with prosecution of cases, and thus able to understand the prosecution perspective, we were able to hear both sides and have credibility with both prosecutors and advocates. In addition, I believe that our focus on domestic violence encouraged one local district attorneys' office to create a specialized unit for domestic violence crimes.[176]

As a clinic, we used our experience in developing one domestic violence court to assist in the development of others and to facilitate the acquisition of grant monies and other funding

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[175] They identified physical problems with the court hallway waiting area and the contact between victims and defendants and communication problems involving the victim being confused about the role of the DA's "victim liaison/advocate" and the advocate from the domestic violence community organization. I was also able to do so because of my knowledge of the court system, which came from repeated observations of the students in the court.

[176] We also performed a "court monitoring" function. "Truthfully, judges were on their 'best behavior' when I was in the courtroom. I felt like I was a supervisor for the judges at times, in that their behavior was tailored to my presence. I am unsure if this improved the DV courts in general, but am sure it did on the days I was there." Email from Christina Nolan to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Jan. 5, 2005) (on file with author) (response from a former DVPU student to the survey sent out by the author).

to provide better staffing and resources on domestic violence matters.[177] Just as one coalition was dying, another blossomed with new energy. A clinic alumnus recently became the district attorney of our home county of Albany and his platform was premised on improved response to domestic violence.[178] A young city court judge, also an alumnus, has expressed the desire to institute a domestic violence court. At about the same time, the Albany Coalition Against Domestic Violence, of which the clinic is a member, received funding from the United States Department of Justice to develop and staff a comprehensive domestic violence court.[179] There is more learning and work to be done.

V. CONCLUSION: WORK WITH THE BEST YOU HAVE TO CREATE A COMMUNITY BASED APPROACH TO PROSECUTION AND TEACHING AND HAVE FUN

The dynamic confluence of events, people, and issues which created the students' experiences over the past four years in the hybrid prosecution project were often unplanned and unanticipated.[180] Thus, I do not proscribe *pro forma* protocols[181] or insist there are prerequisites for success. I do, however, recommend some approaches for creating such a project.

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[177] Recently, we partnered with Albany County and its service providers to form a city court calendar. The partnership was successful in obtaining federal funding.

[178] "Soares said he will also focus on domestic violence, and faced television cameras to address victims directly: 'I want you to know you have a friend in the DA's office. You are no longer imprisoned by the four walls you call home.'" Michele Morgan Bolton, *Soares, in Grand Style, Becomes County DA*, TIMES UNION (Albany, N.Y.), Dec. 28, 2004, at A1.

[179] Albany Law School received funding for a domestic violence prosecution adjunct to train students during the academic year and for student stipends for summer positions with the city's new domestic violence court.

[180] *See supra* Part IV.B.

[181] For an analogous critique of attempts to enforce detailed requirements on the elements of a field placement program, see Seibel & Morton, *supra* note 20. "[T]hese courses, like all others in the curriculum, [should] have adequate supervision by faculty members who are given the time and resources to structure their programs in ways that fit with the constraints and opportunities in their particular schools and geographical locations." *Id.* at 417.

First, law school clinics are in a unique position to foster community collaboration both as a bridge between the activist and government sections and through its alumni.[182] One of the advantages of running a hybrid prosecution clinic in a community in which your larger clinical program has deep roots and a good reputation is the ability to forge alliances among "clinic indoctrinated" alums.[183] As described throughout this article, ALS Clinic's longstanding domestic violence project and other community-based clinics marked it as "community-oriented" while the statewide reputation of the traditional criminal law faculty helped secure respect from prosecutors. Each law school's story and history can shape a community-orientation to prosecution. There are many types of community-based prosecution projects worth exploring.[184] Perhaps the home clinic's focus on representing people with disabilities or the elderly would enhance the appeal of a prosecution project and provide good partners from outside the district attorneys office.

Before a clinic initiates a *domestic violence* prosecution project, it is essential to have worked closely with the local domestic violence community to gain a full understanding of

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[182] *See, e.g.*, Kanter et al., *supra* note 72.

[183] In 2000, the activist battered women's shelter I described earlier started a law project to assist its clients with legal matters or in referrals for legal matters and hired a former Domestic Violence family law clinic alumna. Another clinic alumna, from the Domestic Violence Postconviction Project, was hired to work with the New York State Coalition Against Domestic Violence. A third alumna, who had been working in New York City prosecuting domestic violence, was hired laterally by one of the participating district attorney's office to provide experience in a Domestic Violence court. Thus, three clinic alums who knew each other or knew about each other from the clinic, were able to interact over important domestic violence issues with a shared background and vocabulary. They were also able to support the work of my project and provide valuable supervision and/or resources. I should also add that it is very rewarding personally to see a network of former students doing good work together in the community.

[184] For example, clinics might focus on the prosecution of child abuse, sexual assault, elder abuse or fraud, environmental crimes or collaborate with problem solving courts such as Drug Courts. *See The Birth of a Problem-Solving Court*, 29 FORDHAM URB. L.J. 1758, 1759, 1768 (2002); Lane, *supra* note 17. Clinics should also follow developments of Family Justice Centers for other opportunities to collaborate. *See generally* Casey Gwinn, *Dreaming Big: Creating Justice Centers Across America, Part II*, 10 DOMESTIC VIOLENCE REP. 17 (Dec./Jan. 2005).

battered women's and advocates' specific complaints about law enforcement and prosecution issues in the local community. This is important both for identifying needs and for gaining the trust of those partners. Perhaps doing some pro-bono work, serving on an advisory board, or pairing up with a respected civil attorney for battered women or a domestic violence advocate would be useful in establishing these connections.[185]

Finally, make it fun. Find people in the community and in the prosecutors' office who are good to work with, who have a holistic view of prosecution, believe in the complexity of human beings' lives and their capacity for goodness,[186] and who are passionate about what they do.[187] The infectious nature of that kind of passion is synergistic: it will sustain you, it motivates your students, and it gives succor to those in the community and in prosecutors offices who try to do good and hard work day after day and year after year.

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[185] *See generally* LOPEZ, *supra* note 32.

[186] "The fact the prosecutor had a Masters of Social Work degree, as well as a law degree, made it even better by adding some interdisciplinary perspective." Email from Michael Millemann, Professor, Baltimore City Child Abuse Prosecution Clinic to Mary A. Lynch, Clinical Professor of Law, Albany Law School (Nov. 18, 2004) (on file with author) (discussing the positive attributes of his clinical partner). In addition, I would think that her social work background led to her having a more "holistic" view of prosecution.

[187] "To be able to be exuberant about something is one of life's greatest gifts. Never take it for granted. Nurture it. Give in to it at all times, no matter who goes tsk, tsk behind you." Written by my favorite feminist author on spirituality, JOAN CHITTISTER, GOSPEL DAYS: REFLECTIONS FOR EVERY DAY OF THE YEAR 154 (1999).

BENEFITS OF AN INTEGRATED (PROSECUTION & DEFENSE) CRIMINAL LAW CLINIC

Linda F. Smith[*]

This article describes the University of Utah's Criminal Clinic (the Criminal Clinic), which operates on the externship model, placing students in both prosecutor and legal defender offices. It briefly reviews the evolution of this program and its current structure, describing both the nature of the work the students undertake as well as the "classroom component" that compliments their work. It relies upon data from course evaluations and excerpts from student papers in presenting the advantages of an "integrated" clinic in which both prosecutor and defender interns meet in one class while working in different placements. The article shows how this clinic allows students to acquire the skills of criminal law practitioners as well as to critique the criminal justice system and explore the students' personal values in these roles.

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I. HISTORY

The University of Utah's Criminal Clinic traces its history to the early days of clinical education. In 1971, Professor Ronald Boyce established a relationship with the Salt Lake City County Attorney's office in which law students were placed to assist in felony prosecutions and to handle (under attorney supervision) misdemeanor cases over the course of their third year.[1] Professor Boyce also developed an accompanying one-hour course for the fall semester where he lectured the students regarding what they needed to do during each stage of prosecuting a criminal case (from charging through trial) and on related topics (ethics, relationship with judges, etc.). Students also completed various observations separate from their case responsibilities, some required and some optional. Professor Boyce's assistant maintained complete case files for the students to use at the law school, and Professor Boyce undertook the enormous task of reading every pleading and each "trial brief" the students wrote in their twelve required cases. Students also wrote one paper on any issue that arose from their clinic work. The goal of this part-time program was to enable students to acquire all the basic skills needed to pursue a career as a prosecutor, and many graduates of the program went on to staff prosecution offices in the state.

During the mid-1980s, the law school's clinical program underwent an internal assessment that led to major restructuring. Defender students were included in this program, and a different faculty supervisor was retained to oversee their work. The class was adjusted so that Professor Boyce described not only what the prosecutor should do to prepare the case, but what defense counsel should do as well. Certain assignments were adjusted—for example, rather than preparing trial briefs in all cases, defender students had to prepare a memorandum analyzing plea agreements. By this point, the law school curriculum had added a trial advocacy course, and

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[1] *See* RONALD BOYCE, PROSECUTOR INTERN HANDBOOK (1971) (handbook used in the Clinic, available at the University of Utah S.J. Quinney Law Library).

this course was made a pre- or co-requisite for all criminal clinic students.

In the late-1990s, new faculty took charge of the clinic and created the structure that exists today. We altered the fall class to rely less on lecturing about the steps in the criminal process and more upon the students reading about the process and then working through representative mock problems for each stage. These faculty also perceived that, beyond skills instruction, the class could provide a forum for students to reflect about the criminal justice system. Accordingly, the classroom component was changed to a three-credit year-long graded course while the externship became a five-credit program requiring 250 hours of work.

II. The Program Today—A Description

The program still aspires to help all students acquire the basic skills needed to be an effective practitioner of criminal law. Students are placed in one of various local prosecution (District Attorney, City Attorney or U.S. Attorney) or public defender (Salt Lake or federal) offices. Their experiences vary somewhat based upon the difference in work from office to office.[2] Students "second-chair" two felony cases (when their placement handles felonies), working on those cases where they can be maximally involved or on those cases most likely to proceed to trial. Students spend the bulk of their time handling ten misdemeanor cases under attorney supervision. Students appear in court to argue motions, present guilty pleas and argue at sentencing hearings. While many cases settle, students are also able to serve as lead counsel in trials of misdemeanor cases. These year-long placements require 250 hours of observation and work.

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[2] Occasionally, a student has other goals, and they are met by externing with the Rocky Mountain Innocence Center (investigating provable claims of actual innocence) or with a pro bono attorney handling a death penalty habeas corpus case. These students often participate in the classroom component of the criminal clinic, adding a useful post-conviction perspective on this work.

A. Oversight

There are three strategies for providing oversight to insure the students' placement experiences are appropriate and supervision is adequate: 1) the criminal process course, which includes reflection and discussion (described below); 2) monthly reports; and 3) review of pre-trial briefs, pleadings and other planning documents.

The oversight of the students' work is divided between two co-teachers—one for prosecution placements and one for defender placements—to avoid any conflicts of interest or damage from unintended breaches of confidentiality. Each month, the student provides a brief synopsis of his experiences: observations, hours, case names and work accomplished in each case. This is sufficient to tell whether the student is being assigned appropriate and sufficient work. Each prosecution student must also submit a packet of material for each of his twelve required cases, including a case overview (name of case, charges, essential evidence, procedural steps accomplished and outcome) and a pre-trial brief that sets forth all law, legal issues and evidence needed to prove elements (and source of evidence), any evidentiary issues and intended cross-examination.[3] Students may also submit work product (after it is filed) for review. Defender students submit the same documentation, except they may submit a case-analysis worksheet in lieu of a pre-trial brief where the client wishes to proceed to plead guilty. The worksheet outlines the interview and client counseling and analyzes the propriety of any plea.

All oversight is accomplished by the one appropriate faculty member who reviews written submissions and follows up with private conferences as needed. None of these oversight practices occur during the accompanying class.

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[3] Originally, Professor Boyce was deputized as a prosecutor and reviewed the pre-trial brief with the student prior to trial. Today, supervising faculty review this material after the proceeding to insure adequate on-going supervision and student competence.

B. Criminal Process Course—the Classroom Component

Accompanying the externship work is a three-credit year-long class that focuses upon the steps for handling a criminal case during the fall semester and supports reflection upon the criminal justice system during the spring semester. Since the students have already completed evidence and trial advocacy courses, the skills part of the course is geared to all of the other strategic choices the practitioner faces. These sessions include:

- Investigation & Charging
- Defense Interview & Assessment
- Arraignment & Preliminary Hearing
- Pre-Trial Motions
- Discovery & Investigation
- Negotiation Planning, Dynamics & Ethics
- Plea Bargaining & Sentencing
- Trial Preparation—the Pre-Trial Notebook
- Jury—Selection & Charging
- Trial—Problems in Real Time
- Sentencing, Post-Trial Motions & Appellate Consideration

For each session, the students complete relevant background readings[4] and are given mock cases to analyze in light of local law and procedure.[5] The course uses four different problems that develop over the course of the semester, providing opportunities to confront typical issues.[6] Each week, the students

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[4] Many readings are from ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (5th ed. 1989) and the AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d ed. 1992). Articles written with the practitioner in mind are also included.

[5] The students must also rely upon Utah Code Annotated and Utah Rules of Criminal Procedure.

[6] The four cases include: "The Forgery" (a felony that raises issues of conspiracy and competency as well as selecting the proper charge and conducting a preliminary hearing); "The Booze Case" (a misdemeanor that raises issues of conflicts of interest, prosecutorial ethics in charging and prosecutorial discretion in

must provide written answers to the strategic questions faced at that stage in one or more of the cases. In answering these mock problems, students alternate between taking the roles of prosecutor or defender so that all students experience both perspectives. During each class session, local practitioners (many of whom also supervise the students) participate in class to provide a thorough discussion of the questions presented and how they should be addressed. The use of field supervisors in this way provides the students with concrete and up-to-date answers to their questions, lets supervisors know what instruction the students have received and permits faculty and supervisors to meet and work as a team. The use of these mock cases permits students and supervisors to discuss typical case-handling challenges without the risk of anyone revealing confidential information about an actual, ongoing case.

The class is never used as a forum to discuss current cases or to hold "case rounds," which avoids the risk of breaching confidentiality. However, two class sessions during the fall semester are used to provide *indirect* oversight and supervision. The first class includes an orientation to the program, introduction of coordinating supervisors and advice about best practices in this program. At the mid-term, there is an "Open Mike" session in which students share any challenges they have faced and solutions they have found. This session focuses on systemic challenges within these offices and interpersonal challenges with supervision and can be carried on without revealing confidential information or discussing specifics about cases. However, the class can break into two groups (one of prosecutor interns and the other of defender interns, each with a faculty supervisor) if needed to better address the sys-

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plea bargaining as well as determining the proof necessary for the possible charges); "The Spouse Abuse Case" (a felony in which the identity of the "victim," the case's relationship with a child protective case, access to records and plea bargaining are all issues); and "The Drug Bust" (a felony where probable cause to stop, consent/cause to search, constructive possession, discrimination in jury selection and misconduct at trial are all issues). All cases were developed in consultation with field supervisors who suggested typical scenarios and challenges.

temic or interpersonal concerns.

During the spring semester, the class readings and discussions help students reflect upon the criminal justice system, usually by introducing them to relevant social science theories and findings. These class sessions are usually lead by a social scientist or lawyer well-versed in the topic.[7] Typical topics include:

- Causes of Crime
- Prison & Punishment
- Race & Ethnicity & Crime
- Juvenile Justice
- Mental Health Issues (competency)
- Sex Offenders
- Drug Court
- Domestic Violence
- Victims Rights & Interests
- Restorative Justice
- Community Policing

The sessions that deal with crime, punishment and court structure and operation are usually presented from a sociological perspective. Psychologists often lead the class sessions that consider mental illness, competency, sex offenders and domestic violence. These sessions explore why certain individuals commit certain criminal acts and what can be done to deal with the problems of violence, sexual predation and drug abuse. Students are encouraged to relate this information to their prior cases, in hopes that it may help them better understand what they have encountered. For example, we explore how our knowledge about domestic violence might inform policies on plea bargaining or how the recidivism rates from

[7] Students may also complete research papers on how social science may inform the cases they have encountered. One student wrote an excellent paper on what social science tells us about deterring drunk driving through sentencing. Another student wrote a useful survey of drugs and criminal law enforcement that we have since used as an introductory reading on this topic.

drug court and prison might lead prosecutors to make discretionary decisions.

Students also submit brief reflective writings about some of these topics prior to the class session, reflecting upon how the social science information relates to their own case-handling experiences. Ultimately, each student must write a more thorough, analytical paper (ten-fifteen pages) reflecting upon any aspect of the experience. We have used these reflective assignments during the second semester rather than year-long weekly journals for a variety of reasons. By waiting until the second term to require reflection, students have accumulated a range of experiences and impressions, become comfortable using their skills in their placement and have had the opportunity to understand their particular role and responsibility in the system. We think that at this juncture they are psychologically ready to undertake critical reflection and very unlikely to negligently reveal any confidential information or work product.[8] Asking for written reflections before the class session also has the merit of guaranteeing that the students will read the materials (which otherwise are not covered in any exam!) and this enhances the class discussion with our guest speakers. Since we are able to read their reflections prior to the class session, we can also invite appropriate sharing of students' insights during the class discussion, thus making sure the social science speaks to the students' experiences while protecting against the inadvertent sharing of confidential information.

During the spring semester there are two class sessions that explicitly require the students to reflect upon their experience. The first spring semester class considers prosecutorial

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[8] I cannot remember any instance where classroom discussion evoked a comment that may have revealed confidential information to others. The students begin this program very loyal to their individual "side" of the system and protective of their role in their placement, and nothing we do in the class invites them to share information about an on-going case. If anything, the dynamic of the class over the course of the year is to encourage students to see that both "sides" have much in common and that there is much about the criminal justice system that we can (and should) talk about in order to improve it.

discretion and defense "ethics" (discussed below). The last session(s) of the year involve students presenting their reflective papers to one another.

III. Clinical Pedagogy, Adult Learning and the Importance of Reflection

The Criminal Clinic was designed with foundational theories about clinical legal education, externship structure and adult learning theories in mind.

One of the most important things an externship program[9] can accomplish is to prepare students for a personally and professionally satisfying practice after law school. Anthony Amsterdam asserts that the unique contribution which clinical education makes is to help students learn from experience:

> When we were students, law school did absolutely nothing to prepare us to learn from our experience in practice after graduation . . . . Practice after graduation was either ignored as a potential source of education or viewed as an entirely different kind of education—the school of hard knocks—having no institutional affiliation or functional connection with the school of law.
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> . . . [W]e realize what a misguided and pedagogically unproductive view that was. . . . The students who spend three years in law school will spend the next thirty or fifty years in practice. . . . They can be a purblind, blundering inefficient, hit-or-miss learning experience in the school of hard knocks. *Or they can be a reflective, organized, systematic learning experience—if the law schools undertake as a part of their curricula to teach students effective techniques of learning from experience.*[10]

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[9] In designing this "externship program," we decided that the field placement component should be accompanied by an academic component in which experiences in the field will be critically considered and reflected upon because that was "best practices" in clinical legal education. *See* Am. Bar Ass'n, Committee on Guidelines for Clinical Legal Education 20 (1980). "The classroom is the basic forum in which the teacher can integrate theoretical and empirical data with students' experiences in assuming and performing lawyer roles and participating in legal processes." *Id.* at 68-69.

[10] Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspec-*

Robert Condlin explains why field placements are ideal for such reflective learning from experience:

> Students should learn about lawyer practices . . . in a setting that represents the one in which those practices are typically carried on. . . . Protection against being overwhelmed by the vocationalism of the law office milieu or its concomitant pressure to turn intellectual analysis platitudinous or instrumental should come from a law professor who intervenes when these dangers threaten.[11]

Condlin further explains why an extern program is a better way to promote discussion and critique than simply having a class that studies critical theories about practice:

> [I]f one is interested in a moral philosophy of lawyering it is necessary to deal with these questions in the first person. Moral understanding is arrived at by critical reflection on activities that have been experienced pre-reflectively and begun to be internalized as dispositions. Until disposition is present, at least in some minimal or beginning form, the moral character of action cannot be fully understood. *Without the experience of acting in lawyer role moral philosophizing will be just so many words.*[12]

The students' experiences as externs (or as paid clerks) will result in their "learning," whether they reflect on it or not. In addition, other learning from the externship experience is subconscious, involving the feelings, attitudes, and values of stu-

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tive, 34 J. LEGAL EDUC. 612, 615-16 (1984) (emphasis added).

[11] Robert J. Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 62-63 (1986). *See also* Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211, 216 (1989)("[T]he internship serves as a laboratory for experimenting with skills and for observation of and reflection about the legal profession."); Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools,* 19 N.M. L. REV. 287, 325 (1989) ("The most important teaching task the law school can perform is giving students the ability to learn from their experience for the rest of their lives. This should be the primary function of any classroom component . . . . ").

[12] Condlin, *supra* note 11, at 66-67 (emphasis added).

dents. Often students are not aware of how their sensibilities are being influenced as a result of their externship experiences unless they are urged to examine these influences explicitly.[13]

Because our students are experiencing and being influenced by the world of practice, it is incumbent upon the law school curriculum to promote reflection upon practice.

Just as Tony Amsterdam[14] complained that his legal education had ignored practice, viewing it as "the school of hard knocks," so, too, do other professionals criticize their professional schools for having inadequately prepared them for practice:

> Practitioners report that their professional education programs do not prepare them to deal with the profound moral conflicts and developmental challenges of their working lives. They experience tensions between personal and professional values, organizational mores and individual commitments, and bureaucratic expectations and their own standards, and they feel ill-prepared to work productively amidst these dilemmas.[15]

Professional education can be improved by coupling experience in the professional world with a forum for "reflection"[16] on these experiences. Reflection should be supported and promoted in any adult, professional education program: "Reflection is essential for adult development in both the personal and professional spheres. It enables us to identify and correct distortions in our personal belief systems and it allows us to evaluate successes and failures in the workplace, providing oppor-

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[13] Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 NOVA L. REV. 95, 109 (1987).

[14] *See* Amsterdam, *supra* note 10 and accompanying text.

[15] James Wallace & Celeste M. Brody, *Introduction* to ETHICAL AND SOCIAL ISSUES IN PROFESSIONAL EDUCATION 1, 2 (Celeste M. Brody & James Wallace eds., 1994).

[16] "Reflection is an important human activity in which people recapture their experience, think about it, mull it over and evaluate it. It is this working with experience that is important in learning. The capacity to reflect. . . it may be this ability which characterizes those who learn effectively from experience." D. BOUD, R. KEOUGH AND D. WALKER, REFLECTION: TURNING EXPERIENCE INTO LEARNING 19 (1985).

tunities to improve our performance."[17] Reflection is needed in adult education because adult learners bring with them habits of interacting and preconceived notions about proper behavior in their professional roles:

> If we are to move our students from unreflective and reactive modes of coping based on their personal repertoires, it is necessary to evoke these implicit personal paradigms. Our challenge has been to engage students in recognizing their own paradigms, to explore their uses and misuses, and to test the usefulness of other paradigms.[18]

Although reflective learning has enjoyed a recent resurgence of popularity, it has the most classical of roots. In 1933, the educator and educational theorist John Dewey defined reflection: "Reflective thinking, in distinction from other operations to which we apply the name of thought, involves (1) a state of doubt, hesitation, perplexity, mental difficulty, in which thinking originates, and (2) an act of searching, hunting, inquiring, to find material that will resolve the doubt, settle and dispose of the perplexity."[19] Dewey forcefully argued that "it is not sufficient to 'know,' there also needs to be an accompanying desire to 'apply.'"[20] He "characterized reflection as comprising five phases. . . . suggestions, problem, hypothesis, reasoning and testing."[21]

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[17] Robert R. Klein, *Reflections and Adult Development: A Pedagogical Process*, *in* ETHICAL AND SOCIAL ISSUES IN PROFESSIONAL EDUCATION, *supra* note 15, at 89 (citations omitted).

[18] Gordon Lindbloom, *Learning about Organizational Cultures and Professional Competence*, *in* ETHICAL AND SOCIAL ISSUES IN PROFESSIONAL EDUCATION, *supra* note 16, at 225.

[19] JOHN DEWEY, HOW WE THINK 12 (1933 rev. ed.).

[20] J. JOHN LOUGHRAN, DEVELOPING REFLECTIVE PRACTICE: LEARNING ABOUT TEACHING AND LEARNING THROUGH MODELING 4 (1996).

[21] *Id.* at 5. "Suggestions are the ideas or possibilities which spring to mind when one is initially confronted by a puzzling situation. . . . Problem or intellectualization is . . . . understanding the perplexity of a situation more precisely so that courses of action may be more fully thought through. . . . Hypothesis formation is when a suggestion is reconsidered in terms of what can be done with it. . . . seeing how the hypothesis stands up to tentative testing. . . . Reasoning is when the linking of information, ideas and previous experiences allows one to

More recently, Donald Schön has focused on the need for reflection in a wide variety of professional areas of practice.[22] Schön asserts that "the crisis of confidence in the professions"[23] is due to the recognition that professional practice is not simply rigorous instrumental problem-solving according to scientific techniques.[24] Rather, professionals are confronted with problems of "uncertainty, uniqueness, and conflict" for which their classroom training fails to provide answers.[25] Schön compares problems of "uncertainty" to Dewey's "problematic situation" in which the definition of the problem itself is the greatest challenge.[26] "Unique" situations do not fit the predefined categories of the classroom. And "conflict" includes circumstances where goals are "vague, unmeasurable or conflicting" so that the challenge is to decide upon what goal should be sought.[27] Schön asserts that competent professionals do deal with problems of uncertainty, uniqueness and conflict, but to teach students how to become such competent professionals, we should ask, "what is it that competent practitioners actually know when they are being competent [and handling such problems]?"[28] Schön believes that there is a "reflection-in-action" or "knowing-in-action" upon which competent professionals rely.[29]

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expand on suggestions, hypotheses and tests, to extend the thinking about and knowledge of the subject. . . . Testing is the phase in which the hypothesized end result may be tested." *Id.* at 5.

[22] DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). Schön both relies and expands upon Dewey's theories. *Id.* at 65.

[23] *Id* at 14. "Over the last twenty years, however, my experience has been that all the professions have become confused. In all of these fields, . . . there is now some turbulence about what we mean by professional knowledge and how we should really educate students in it." Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 232-33 (1995).

[24] "According to the model of Technical Rationality . . . professional activity consists in instrumental problem solving made rigorous by the application of scientific theory and technique." SCHÖN, *supra* note 22, at 21.

[25] Schön, *supra* note 23, at 237; *see also* SCHÖN, *supra* note 22, at 21-49.

[26] Schön, *supra* note 23, at 237-39.

[27] *Id.* at 240.

[28] *Id.* at 242. This inquiry is in contrast to asking "'how do we apply science to practice better?' or 'how do we generate more useful science for practice?'" *Id.* at 242.

[29] *Id.* Schön compares such professional "knowing-in-action" to individuals

> [T]he workaday life of the professional depends on tacit knowing-in-action. Every competent practitioner can recognize phenomena—families of symptoms associated with a particular disease, peculiarities of a certain kind of building site, irregularities of materials or structures—for which he cannot give a reasonably accurate or complete description. In his day-to-day practice he makes innumerable judgmentss of quality for which he cannot state adequate criteria, and he displays skills for which he cannot state the rules and procedures. Even when he makes conscious use of research-based theories and techniques, he is dependent on tacit recognitions, judgments, and skillful performances.[30]

Accordingly, "the study of reflection-in-action is critically important."[31] Schön describes the reflective practice which will allow the competent professional to "learn what he knows" and assist in educating the novice: "[T]he process of learning what you know is a research process. You have to observe the actual behavior. You then have to reflect upon it and construct a description of it and you have to test that description against further behavior . . . ."[32]

> [I]nquiry. . . turns into a frame experiment. . . . [T]he inquirer is willing to step into the problematic situation, to impose a frame on it, to follow the implications of the discipline thus established, and yet to remain open to the situation's backtalk. Reflecting on the surprising consequences of his efforts to shape the situation in conformity with his initially chosen frame, the inquirer frames new questions and new ends in view.[33]

"knowing" how to right a wobbling bicycle without being able to explain what they do or why, being able to recognize faces without having a theory or explanation of how to do so, *Id.* at 242-243, and speaking in conformity with rules of phonology and syntax without being able to consciously describe such rules. SCHÖN, *supra* note 22, at 53.

[30] SCHÖN, *supra* note 22, at 49-50.

[31] *Id.* at 69.

[32] Schön, *supra* note 23, at 243.

[33] SCHÖN, *supra* note 22, at 269.

Schön argues that reflection upon practice can lead the professional to transform his relationship with his clients.

> Here the professional recognizes that his technical expertise is embedded in a context of meanings. He attributes to his clients, as well as to himself, a capacity to mean, know, and plan. He recognizes that his actions may have different meanings for his client than he intends them to have, and he gives himself the task of discovering what these are.[34]

The tools we rely upon in the criminal clinic provide just such a perspective for the student to consider the meaning of his professional actions. As the reflective professional re-considers her relationship with those she serves, the professional is freed to consider "What in my work, really gives me satisfaction?"[35]

Involving the student in actual clinical work invites emotional reactions. It is incumbent upon us to offer our students a framework and a forum to process their reactions. This invitation to explore personal values, lawyering roles and professional responsibility is the most important component of the criminal clinic.

IV. Educational Benefits—What Our Students Have Learned & Have Taught Us

Our students' reflective writings are particularly rich documentation of the learning that has occurred during the course of the year. Their classroom discussion is also rich, but more fleeting and less easily documented. The students' course evaluations, perhaps the most scientifically valid evidence, also provide some insight.

One of the major programmatic questions that was confronted in 1985 was whether the oversight and education of legal defender interns should be integrated with the then-existing prosecutor program. Today, this well accepted and popular integrated clinic seems natural to all. This article will rely upon the available evidence and show why an "integrated"

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[34] *Id.* at 295.
[35] *Id.* at 299.

clinic such as this can enhance both skills acquisition and, more importantly, the student's ability to think critically about the criminal justice system and to explore her own personal values and possible place within this system.

A. Course Evaluations

Each "clinic" at the University of Utah College of Law includes certain extern placements coordinated with a "classroom component." Students' course evaluations ask the same questions about each clinic, for example, whether:

1. The clinical/service experiences enhanced my learning in this class
2. This class prepared me for my clinical/service experiences
3. This class helped me reflect upon my clinical/service experiences

Students respond on a Likert Scale (1-6) from "strongly disagree" (1) to "strongly agree" (6).[36] Over the course of two recent years, students' responses to these questions in each of six clinics were analyzed revealing these data:

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[36] Student responses could include: 1-strongly disagree, 2-disagree, 3-somewhat disagree, 4-somewhat agree, 5-agree, 6-strongly agree. Thus, 3.5 was "neutral" and any score about 4 was positive.

Question	Lowest Clinic Score	Highest Clinic Score	Two-Year Average of all Clinics	Two-Year Average for Criminal Clinic
clinic enhanced class	4.17	5.78 (Crim. Clinic)	5.19	5.71
class prepared for clinic	3.6	5.75 (Crim. Clinic)	5.08	5.31
class helped me reflect	3.25	5.75 (Crim. Clinic)	5.1	5.5325

These data demonstrate that the clinical program we operate is well-designed—the "classroom components" and fieldwork compliment each other; the classes are helpful both in preparing students for field work and in supporting reflection upon their experiences. As the data clearly indicates, the Criminal Cclinic is better than the average of all clinics on each dimension, and one semester of the Criminal Clinic was the highest scoring section of any clinic on these issues. This high rate of satisfaction regarding the clinic/class interrelationship demonstrates the success of the design both as a method of preparing students for their criminal law practice experiences and as supporting student reflection about the criminal justice system and their possible careers in it.

B. Discussion of Values in an Integrated Clinic

Most of our third-year Criminal Clinic students are seeking or considering a career practicing criminal law. This career focus is ideal to engender their critical reflection about the lawyering roles in the criminal justice system.

Perhaps because of this career orientation, most of our students arrive at the clinic with a definite and strong preference regarding which "side" of the case they want to han-

dle—most students prefer to serve as prosecutors.[37] Because placements are limited, students are asked if they are willing to participate on either side, and most students are indeed willing to switch sides if they have no direct conflict of interest due to clerkship work.[38]

However, many have entered the program with a rigid view of their assigned roles and of the opposing attorney's attitudes. Many student prosecutors believe that a good prosecutor must always go for "the max" and that all defenders are bleeding-hearts who naively and unfailingly believe clients' stories and excuses. During the fall semester, while the students get acclimated to their offices, we do not ask students to reflect upon their roles or values. We do, however, make students analyze the mock cases from both perspectives, and we invite both defenders and prosecutors to most classes in which the problems are discussed. Often students note that both guests see the mock cases in the same way; the session in which a prosecutor and defender walk through their analysis and negotiation of a case is particularly useful in demonstrating this.

Then, the first class of the spring semester we ask these students to think critically about attorney roles and about the values in criminal law practice. We introduce this discussion with readings that focus on prosecutorial discretion[39] and defense "ethics."[40] The readings are designed to encourage students that they have the right to define for themselves the role they will play and the moral justifications they will develop as

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[37] In fact, there was only one year in the last twenty that the enrollment in the defender placements exceeded the enrollment in the prosecutor placements.

[38] We give priority to student "preferences" that are driven by a conflict due to clerkship work and seek volunteers for placement on the less preferred side from those without such conflicts.

[39] Students read excerpts from Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 186, 196 (1988), in which the author sets forth a theory about how prosecutors should exercise their substantial discretion.

[40] Students read excerpts from John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980), in which the author answers the persistent question of how he can justify defending the guilty.

a prosecutor or defender in the criminal justice system. The very fact that different people—these authors—have troubled to define their mission in a philosophically coherent manner is informing and liberating for the students.

Rather than discussing the philosophies of the articles, we begin class discussion talking about our feelings. Students are asked to consider what frustrations they have experienced in dealing the "the other side" or with "the system," whether they had any preconceived notions about their own role and what difficulties they have faced in assuming that role. This session is attended only by the students and the faculty supervisors so that students will feel safe in talking (positively or negatively) about lawyers they have encountered. This class session is usually an intense experience where the students truly engage these issues on a personal level.

To begin the class discussion, each teacher shares one thing he or she finds most bothersome about attorneys on the other side. When Professor Paul Cassell and I co-taught the class, he explained how he hated it when, as a prosecutor, he would reduce charges and offer what he thought was an eminently fair plea bargain, only to have each defense attorney ask for more. He assumed the defense attorneys needed to play a game of bargaining to look good to their clients. I empathized with Paul's frustration; it seemed he really wanted to be thought of as fair and even-handed, and the negotiation game deprived him of this recognition. (Since our students saw Paul as a fair and decent professor, I think my analysis seemed credible to them.) I also told Paul that negotiation texts call his preferred approach "Boulwareism" and recommend against it because negotiators typically want to experience an even give-and-take. (This analysis, though different than Paul's analysis at the time, suggested to our students that there may be more than one way to understand and come to terms with difficult feelings experienced in practice.) In this way, we empathized with one another's frustration and tried to deal with our feelings by understanding practice and understanding ourselves.
With this opening, we invite all the students to share what they have found most bothersome about their opponents or

about the criminal justice system. We invite them each to share one aspect of the current role which has been difficult for them to assume. This invitation invariably leads to an out-pouring of thoughtful but widely varied reactions.

Almost every student identifies supervisors whom she sees as mentors. Some students recall the prosecutors and defenders who co-taught some early classes and express a new understanding that opposing counsel is not the enemy, but a fellow practitioner. Most students had silently disagreed with or felt critical of at least one supervisor. They recount their experiences or observations and explain why the supervisor's behavior seemed wrong-headed. Often, more than one student knows of a particular case or personality. Sometimes students on opposite sides of the aisle have reached similar conclusions about mentors and role models! Some students assert that their experiences had been exactly as they expected and had confirmed their desire to pursue this career. Usually, they can also point to particular aspects of the practice (e.g., the individual control of the prosecutor, the common esprit de corps of the defender office) which they enjoy. Some students have discovered they no longer want a career in criminal law, often for reasons (e.g., the harried pace and lack of preparation time) they had not anticipated.

During this discussion, it is not unusual for at least one student to explain that he had begun the year with a firm conviction that he could only serve as a prosecutor (or a defender), and now he has come to see that he could be satisfied in the other role as well. The degree to which this class supports the idea that both roles in the criminal justice system are respectable and valuable is well-illustrated by the fact that one year, two students needed to have their placements adjusted to avoid conflicts of interest—one prosecutor intern had taken a clerkship with a defense attorney and needed to become a defender intern; a different defender intern had been hired as a clerk in the District Attorney's office and needed to become a prosecution intern!

Often, I have to assume my other identity as teacher of the Legal Profession class and remind students that prosecutors

and defenders do not have parallel roles. Prosecutors have the duty (and freedom) to "do justice" while defenders have the duty to fully advise their clients but ultimately pursue the path their clients choose. (Defenders do have the freedom to speak in personal and candid terms to a client, but not to manipulate his decision.) Similarly, prosecutors may be obligated to dismiss a case, but defenders are always entitled to put the state to its proof. Students' natural feelings that it should be a contest with the same rules for all is ultimately tempered by their understanding of the complex system our Constitution requires.

One defender student shared his experience when he (and his supervisor) chose to develop a candid and personal relationship with a particular client. When the client effusively thanked them for arranging a desirable plea bargain, the student replied that the thanks he sought was the client's firm commitment to support his new wife and young child. The student commented that such communications were not effective for every client, but that where it might matter, he (like his supervisor) wanted to include care and concern in his practice.

This class session is often a cathartic experience. The students are affirmed that it is all right to feel challenged and not entirely at-one with the office mentality. They are also reaffirmed that outlandish behavior often seems outlandish from all perspectives within the criminal justice system. Thus, they conclude, they need not be the most heartless prosecutor nor the most bleeding-heart defender to pursue a balanced career in this challenging area of law. They gain some encouragement to begin to develop their own philosophy for practice.

C. Further Reflections About Values and Roles

Later in the semester, students submit an analytical "thought paper" arising out of their experiences in the field of criminal law. Their topics vary widely from analyzing how discretion is and should be exercised in domestic violence cases to exploring the ethics and skills of plea bargaining with an unrepresented defendant. The final reflective papers of all students from one year were analyzed with respect to the topics

and common themes. Most of the papers focused on: a) the student's assumption of role; or b) the roles played by others in the office; or c) systemic challenges and suggested changes and improvements to the criminal justice system. A few papers dealt with a particular experience or set of experiences (e.g. losing a case at trial) and then focused on what the student learned from that experience about himself, how to act in her role or about the system. A brief synopsis of the topics or essential themes follows:

Prosecution Student Papers

Role of the Good Prosecutor—not to convict the innocent & need for training
Role of the Good Prosecutor—neither overzealous nor underzealous
Role/Systemic Structure—of juvenile, JP, district & drug court
Role/Systemic Challenges—rural attitudes toward federal court misdemeanors
Systemic Challenges—domestic violence cases
A Trial I Lost—what I learned about trial strategy in a misdemeanor

Defense Student Papers

Role of the Defense Attorney—the "nice" vs. the "aggressive" lawyer
Role of the Defense Attorney—dealing with difficult cases and strong emotions
Systemic Challenges—differences between the ideal of justice and actual practice
Systemic Challenges—problems with the federal sentencing Guidelines
Systemic Challenges—problems with the death penalty

As this listing demonstrates, both prosecutors and defenders reflected about the role they had assumed and recognized the challenges of carrying out that role. Both recognized prob-

lems with some aspects of the criminal justice system or its practice in some areas. Of course, most students saw problems from the perspective of their own role, rather than from some universal critical perspective. Defenders saw problems in which their clients were treated unfairly, and prosecutors saw problems in which they were unable to obtain the outcome they thought was just. Nevertheless, their insights and commentary were often consistent. Relying upon the papers from this year alone, one can discover a handful of common themes.[41]

1. Prosecutorial Discretion

One theme was prosecutorial discretion, with both prosecutors and defenders making some critical comments. Prosecutor Student (PS) #1 argued that although a count should be dismissed if there was inadequate evidence to obtain a conviction, a few prosecutors would press such a count in a multiple-count case simply to "scare" the defendant. PS #2 and PS #4 criticized some cases as unwisely filed in the first instance. Defender Student (DS) #2 and DS #4 both argued they had seen "over charging" and DS #5 wondered about the fairness of seeking the death penalty in a particular case.

PS #1 made these points about the prosecutor's power to charge or not:

> I have noted that the role of the prosecutor is omitted from virtually every examination of the protections afforded a defendant; that is, the accused's first line of defense is, indeed, the prosecutor. . . . Prosecutors are sworn to uphold the Constitution. . . they do not . . have any interest in convicting the innocent. . . . Every day the government abandons cases it does not think it can win. . . .
>
> However, in the same vein, there are also prosecutors who

[41] Since students' papers varied widely—some taking one topic and developing it thoroughly and others expansively discussing many experiences—it is not possible to use these papers to prove anything about the uniqueness or commonality of all students' experiences. The male gender is used to refer to the student author where necessary as a grammatical convention.

> will pursue a criminal conviction in the face of a lack of evidence with the intent to simply scare or antagonize the defendant. . . . [But] prosecutorial agencies have a heavy burden to ensure that they are seeking justice and not some personal agenda in the name of the people.

PS #3 discussed his respect for the Juvenile Court while musing why certain cases were even brought:

> What I didn't like was that many of the cases just don't seem to belong in the criminal system at all. A fight at school . . . I now realize that maybe it was proper . . . [to get adequate resources for the youth. What might appear as an insignificant case on paper may be the last straw at school where detention and expulsion have failed to deter bad conduct.] Unlike schools, the court can compel the parent's involvement in the case.

The discretionary decisions of prosecutors to charge was considered by DS #2, #3, #4 and #5. DS #2 noted one case in which the client had sought and received informal approval from a police officer for possessing a weapon that he was later charged with possessing illegally. DS #2 also represented a "civil rights activist who was charged with disturbing the police when he refused to leave a crime scene [because he] was concerned with the use of force by responding officers." DS #3 questioned the decision to press charges against a defendant who had previously gotten a co-habitant abuse action protective order against the "victim" in this case, in light of the tit-for-tat retaliation that appeared to be occurring between the victim and defendant. DS #4 stated that federal prosecutors might consider dismissing the federal charges (perhaps permitting state charges to be filed) where the federal sentencing guidelines were "excessively harsh." DS #5 worked extensively on a death penalty case and researched the various problems with fairness in death cases. DS #5 wrote "I could not help but wonder "Why is the death penalty sought on this case, but not on other cases that are similar in fact?"'

2. Pressure to Plea Bargain Cases

Another common theme was the existence of and the problems with the "economic pressure" for plea bargaining, which prosecutors (PS # 2, 4) understood as a institutional pressure to settle/plead out misdemeanors that were not worth trying, and defenders (DS #1) felt as subtle pressure from the District Attorney and the judge to talk their clients into taking the plea bargain offered.

PS #2 referred to the problem of "under-zealousness":

> I would agree that prosecutorial overzealousness is a serious problem . . . .I am also equally concerned about prosecutorial under-zealousness . . . [and] the reasons underlying prosecutorial decisions to dismiss rather than prosecute . . . [or for] obtaining overly lenient penalties . . . Many [federal misdemeanor defendants] are charged with relatively minor violations such as chopping up picnic tables or snow boarding on property that belongs to the VA [and we] were expected to plea bargain and dispose of the vast majority of cases. . . . Proceeding to trial in such cases is considered a waste of scarce resources. . . .
>
> On the other hand, I have had federal officers and frightened family members relate to me their own outrage [at the case being dismissed or settled with a light punishment].

PS #4 was troubled that an officer spent days investigating and pursuing a group on federal lands before arresting them, when simply informing them they were violating permit requirements in the first instance would have been better law enforcement. This student reported other cases where the defendants had chosen to break federal laws as a form of civil disobedience, and calling forth costly federal prosecution was part of their protest plan.

DS #1 wrote movingly about two "types" of defenders reacting to the pressure to settle misdemeanor cases:

> Certain lawyers (A) respond to this pressure by encouraging every client to accept a plea bargain. . . . Other lawyers (B) find this pressure to be a personal challenge and therefor pressure every client to go to trial. . . . Lawyer A is a very

nice person. He believes that his clients have had difficult lives and that the criminal justice system is unduly harsh. . . . Lawyer A believes that in almost every situation accepting a plea bargain is in the client's best interest. . . . He believes that most of his clients are guilty. He does not hold this guilt against the client, but rather sees the client as someone who needs help. Lawyer A believes that entering a guilty plea will provide the client with two services. The first . . . is eliminating the possibility that the client will be convicted of multiple charges instead of pleading guilty to one. This reduces the amount of time that the client can spend in jail. The second service Lawyer A provides his clients by negotiating plea bargains is arranging for the clients to get the treatment they need to deal with the problems they have in their lives.

If Lawyer A does not notice that the police did not give the defendant the Miranda warnings before interrogation, Lawyer A is not providing effective assistance of counsel . . . . However, I would argue . . . that Lawyer A's bigger ethical problems are directly connected to being "too nice" . . . to the extent that Lawyer A is worried about pleasing the court and the prosecutor. . . . This conflict of interest become more serious in light of Lawyer A's belief that being nice will help his clients to collectively receive better deals. Lawyer A does not owe a duty of loyalty to his clients as a collective . . . .

I feel that I learned the most from working with attorneys who were not nervous about being "aggressive." I am not a particularly asserting human being and so for me observing the differing ways in which people defend the interest of their clients was very helpful. . . . I learned that lawyers work in an adversarial system and that the structure of that adversarial system is such that our every word will have an adversarial impact, regardless of how polite and reverential we appear when we say it. This means sticking up for my client through motions and trials should not make judges and prosecutors like or dislike me . . . If I act with respect and good faith my slowing down the judicial process in the name of due process should not be seen as a problem.

A related theme was the prosecutor's difficulty in effectively negotiating with an unrepresented defendant so that the defendant could make an informed decision about whether and how to plead and how well the courts dealt with these unrepresented defendants. (PS # 2, 3, 4). All three students regretted situations where clearly guilty defendants had no defense attorneys to advise them that the rational thing was to accept the plea bargain. However, these students also all observed cases in which the unrepresented and unwise defendant's case came out all right in the end.

> [An individual under extreme stress assaulted an officer. Denied counsel, he refused to plead guilty.] On the day of trial, after the defendant had an opportunity to express his outrage, he eventually pleaded guilty. Unexpectedly, however, despite there being no substantial reduction in charges, the defendant seemed to feel better. (PS #2)

> The most difficult part of the job, ethically and intellectually, was . . . [plea bargaining with unrepresented defendants, who often failed to accept a generous offer.] The pro se defendants were not unlike a deer staring into the headlights of an oncoming car, they would fumble through their own defense, invariably take the stand and offer incriminating admissions, and then stand there waiting to get hit with the punishment. I always momentarily lost my breath when the judge would say "30 days jail" and then pause while she wrote out the sentence, a long pregnant pause, and finally say, to my relief and certainly to theirs "suspended with payment of fee." I always wondered what the defendant was thinking during that long pause. (PS #3)

> We expressed our desire to the Magistrate to try to keep the trials focused on the issues the defendants have been charged with to prevent it from turning into a long day of just bashing the federal government. The Magistrate expressed a different view, he acknowledged that almost everyone that challenged their citations in his court were 100% guilty. In fact, most of the time the defendants never factually contested the officer's version of the events, but rather, felt that their dislike of the federal government should be a defense. . . . The Magistrate

felt that the purpose of the trial was not only to determine guilt or innocence, but also to let the defendants have their say. The Magistrate felt that most of the defendants just needed their day in court and then they would calm down and pay the fine.

At first, I considered the Magistrate's philosophy to be somewhat ridiculous and a waste of time. . . . However, after having time to reflect, I think this philosophy illustrates . . . the goal of that court was to resolve or reduce conflict. "Listening is more important then talking" when trying to revolve conflict and distrust,[42] as a way for the defendants to get their anger and frustration off their chest. Part therapy, part justice.

[One of these misdemeanor trials] took over five hours, about three hours longer than it probably should have taken. . . . [The defendant] never really contested the underlying facts of the case [but] introduced all kinds of evidence that had little or no relevance to the case. . . . Hearsay seemed to be fair game as long as it was not double hearsay. Finally [the defendant] rested. It took the Magistrate about two second to render his verdict: guilty, and another second to impose sentence: $500 fine. [But] the magistrate's philosophy seemed to work. There was a drastic change in [the defendant's] demeanor from when the trial started to when it ended. . . . When he arrived that morning . . . he was very combative and unwilling to speak with us. By the end of the trial he was actually having conversations with us and being polite. And this was despite the fact the verdict was guilty. . . . Whatever the cause, the trial process had actually seemed to resolve some of [the defendant's] anger even though he lost the case. (PS #4)

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[42] Jeffrey Z. Rubin, *Conflict From a Psychological Perspective in* NEGOTIATION: STRATEGIES FOR MUTUAL GAIN 135 (1993).

3. Disjunction of Theory and Practice

Both prosecutor and defender students noted that the discovery of "truth" may lose out to other goals of the criminal justice system and came to terms with this reality. PS #1 noted that cases should be dismissed where there is inadequate admissible evidence to obtain a conviction, even though the prosecutor is convinced of the defendant's guilt. PS #3 noted the degree to which procedure overwhelmed getting to the merits in district court: "Everything was mired in procedure. The Court was not focused so much on resolution or problem solving, but instead centered on keeping people in jail." PS #4 ultimately accepted that court trials were "Part therapy, part justice." PS #5 wrote "of many experiences that I had that exposed the justice system's apathy and the justice system's inability to solve the problems of domestic violence." DS #1 wrote about the personalities of defenders (nice vs. aggressive) that might influence, improperly, how a case is handled for the client. DS #3 wrote about this disjunction between the law and procedure on the books and the ways in which law in practice can fall far short of these ideals, citing a domestic violence case in which both members of the couple seemed committed to using the legal system to fight an on-going interpersonal battle. A second example involved the ideally cooperative client who consistently asserted his innocence and had an eminently triable case, but who, at the last second, walking to the assigned courtroom for trial, decided to accept a plea bargain.

> I was beside myself, thinking we had come this far and now my client thinks it is better to settle the case. I will never know the real reason why he decided to do this and I can only speculate that he was concerned about getting his probation revoked from a prior unrelated charge if he was found guilty on the pending charge. . . . The cynic might say that the goal of the defense attorney is to get the client off. . . . [However my view,] at the risk of sounding softhearted, is that the ultimate aim should be justice for all clients involved, whether the state or the alleged criminal. (DS #3)

DS #4 commented upon personal and political constraints within law enforcement on the prosecutor's willingness to dismiss charges:

> Class discussions during Criminal Process have shed some light for me on prosecutors' reluctance to dismiss charges. I have learned that dismissing charges can cause tension between law enforcement agencies and the prosecutor. Because prosecutors are dependent upon law enforcement agencies for investigation and follow-up on cases, it is imperative that prosecutors maintain amicable relationship with law enforcement.

4. Systemic Problem—Domestic Violence Cases

Problems with the criminal justice system's treatment of domestic violence intruded into various papers. (PS #3, 5 and DS #3). PS #3 wrote:

> Domestic violence cases are the bane of the Justice Court. DV cases are awful on so many levels. They are like a glimpse into the dark-side of society, they seldom get resolved, and the system is ill equipped to handle them. The number of cases I have personally dismissed or have observed others dismiss due to 'witness problems' is embarrassing. The judicial system falls apart dealing with DV. The police are skeptical, the abusee is reticent, and the abuser is blameless. The children are the true victims in most of these cases and yet there is little that can be done to address their problems.

PS #5 wrote an extensive and moving analysis of all the failures in this system and all the changes that should be pursued. PS #5 said that the judges usually do not make their encounter with the defendant meaningful in the way that the Drug Court Judge both calls to account and cares about drug court defendants. The police see the cases as hopeless, with one officer discussing a plea agreement made after the wife refused to testify by saying he didn't care about the plea agreement because "either they would stop doing this to each other or they would end up killing or really hurting each other." He reported

that a prosecutor, after a day in which all victims either failed to appear for the trial or appeared and refused to testify, commenting that he "hated domestic violence cases" because they were "evidentiary nightmares." The majority of victims the student encountered were unwilling to testify or press the charges, most had already talked to defense counsel, and some thought that "spousal immunity" would excuse them from testifying. PS #5 noted that defense attorneys advise their clients and negotiate outcomes based on the victims' refusal to testify.

The student mused about solutions:

> I have looked into the possibility of charging the victims with false information to a police officer or perjury or contempt of court when they fail or refuse to testify. But such a reaction would only feed the apathy that is prevalent in the system today. Victims would grow even more fearful of involving the police, police would be viewed as the enemy, and the victim would no longer be viewed as an unwilling victim but an accomplice.

Better ideas included changed practices by prosecutors, defense attorneys, and in court proceedings:

> It was enlightening in class discussion when someone mentioned that defense attorneys should help their clients see the destructive nature of their actions. I believe a defense attorney who lectures and counsels his client to be a good husband and take responsibility for his actions is necessary. . . While I was never present when conversations occurred between the defendant and the defense attorney, I hope that the attorney did not congratulate the defendant [after charges are dismissed] and send him on his way.
>
> The change the prosecutors must make is they need to make domestic violence prosecutions meaningful by talking with victims as people rather than just witnesses, by pursuing cases that are probable winners, and by making convictions memorable to the defendant.
>
> [Another answer may be] restorative justice. . . [Now] the bad

> acts of the defendant are recognized and punished without creating a long-term solution that will allow reconciliation or closure on the relationship. . . It would allow the defendant a forum whereby his perspective can be examined and placed into the larger picture by community leaders and other parties invited to the conference. Relationships are more complex than the belief held by the system that one person is at fault and the other person is a victim. While no one deserves to be hit, that person cannot act in a way that provokes the attacker [if they are to live in harmony.] A restorative justice approach would allow the victim to help fashion a punishment that is suitable to the situation instead of forcing the victim to choose between two unchangeable and undesirable outcomes. The adversary system is not set up to deal with the victim and a perpetrator who are married and pursuing some of the same goals.

DS #3 wrote about a domestic violence case where the female (with a restraining order) was arrested when the boyfriend called the police alleging she was at his home and she threw things at him while he was trying to keep her away, in light of the restraining order. (The boyfriend subsequently loaned the defendant a vehicle to get to court; and the defendant told her lawyer to set the case for trial as soon as possible so it could be dismissed when the boyfriend refused to appear):

> This is an example of what I see as the formal legitimacy of the law not mirroring its social effect, or not having the intended beneficial results. . . [Perhaps] the system was being abused intentionally or the system was deficient at dealing with certain problems.

5. Personal Reactions to the Practice of Law

Most students provided some personal reaction to their clinical experience. Most happily indicated that they learned "I can do this!" and looked forward to getting a job in criminal law. PS #1, #3, #6, DS #1, #2). Often their critique of some aspect of the system included comments that revealed how they felt. (See above.) A couple provided a self-assessment:

> The Criminal Clinic . . . has given me an edge as I make the trasition into the real world where a real paycheck but, more importantly, real lives are at stake. I have seen the "system" in action and, in the process, have recognized some of its weaknesses. As a result, I seek change in the form of better training for myself and those that seek to carry out justice in the name and money of the people. (PS #1)

> All in all the experience has been very positive. In reflecting on my performance as a prosecutor and my experiences as an intern I realize now that I tended to approach my role as a prosecutor from somewhat of a centrist's point of view. I was not a soldier of the State and didn't prosecute all defendants with zealous abandon. I realized that I could still questions authority and dismiss inappropriate charges and still be a very effective prosecutor—maybe a more effective prosecutor. Basically what I have learned is that I can be a trial attorney . . . The experience in the Criminal Clinic reinforced my desire to start my legal career in criminal law. I look forward to finding a job as a legal defender or prosecutor after graduation. Thanks. (PS #3)

> My experience . . . has taught me that different parts of the country [urban vs. rural] sometimes require a different form of justice. . . I have also learned that as a prosecutor and an attorney it is essential that you understand the people for whom you serve. Only then can you resolve conflicts and reach solutions. (PS #4)

One of the defender students wrote about the emotional impact of this work. The student prepared and tried a challenging case involving civil rights issues which attracted some pubic attention:

> I never felt this type of pressure before. To get over my fear I focused my attention on the police officers I was about to cross-examine. I put myself in the shoes of the people in the community that find the time to look out for the rights I try to enjoy. Reflecting on this, I cannot think of anything in school that prepared me for the added pressure I was facing. I feared that if I failed I was letting down the countless num-

> bers of volunteers who fight for minority rights in the community. . . .
>
> Many of our clients were the forgettable first time DUI's or the defendant charged for the 3rd time with domestic violence. [This case] represented unique personalities. . . . [But] the clinical experience taught me that . . . each client requires the same amount of preparation, even in the face of the strong possibility that the case will not got to trial. (DS #2)

DS #2 also wrote about the need to deal with gruesome facts, the need to grieve losses, and the possibility that a gallows sense of humor is necessary to stay sane:

> I speculate years of criminal defense work harden the stomach and the heart. I hope mine will endure. . . . I hope that I will always feel sick to my stomach looking at gruesome facts. . . . Even when a client is innocent the possibility of a real victim leads any human to feel compassion. I have no training in psychology, but perhaps as a coping mechanism it is easier to work on these cases if you can make light of it. . . . The public defender must be able to come up with distractions to keep some sense of reality.
>
> [Salt Lake Legal Defenders provided some insight into how to do this.] A tour of the office is unlike touring any firm downtown. In place of fine art on the walls a visitor will find in one office an "Olympic" weight set, in another, one of those old machines designed to help you lose weight by placing a vibrating belt around your hips. At first I felt this was just an eclectic mixture of poor taste in furniture. On closer inspection, I think it helps as a daily distraction to a day filled with depressing circumstances. (DS #2)

6. Reflections from Other Prosecutor Students

In addition to this complete set of student reflections from one year, there are other prosecutor student reflective papers from prior years where students reflect quite personally about their reactions to their prosecutor work and about how their clinical experiences have changed them. Here are some addi-

tional excerpts.

One student who began the Clinic as a "give 'em hell" prosecutor discovered the ability to empathize with defendants and the capacity for seeing ambiguity:

> First, I have discovered that while I am capable of being a prosecutor, I am also equally capable of being a defense attorney. Both have qualities that appeal to me. Second, my paradigm of the world has changed. Significantly, my conservative ideology of how the criminal justice system should operate has shifted a bit to the left. I no longer view every person charged with a crime as a 'boil' on society's collective rear end. . . .
>
> [During my childhood, adolescence and military career] I held firmly to my beliefs about right and wrong. Indeed, mine was a black and white world where all crimes were punished. . . . The clinic, however, changed all that. . . . . I can remember my first day in Justice court. The defendant was a man not much older than me with four kids, a beat up station wagon, a low wage job, a wife and a drinking problem. In fact, the wife shared her husband's taste for alcohol. The police report told me that a few civilians had witnessed a drunken couple fighting near their car. . . The fight became violent and the wife ended her day with a bloodied lip. . . . I had my witnesses, officers, the beer can, and a tough judge; I couldn't lose. But where was the wife? She was nowhere near [the courthouse] and I was incredulous. How could the victim not show? . . . My thoughts immediately shifted to burning this guy without his wife's presence as a witness. I am happy to report that we won the case and Mr. Tough Guy did some time in jail. This was only one among several cases that revolved around the same fact pattern and I never wavered on my principals. In my mind, anybody charged with domestic violence deserves no sympathy. Indeed, these domestic violence defendants would rot in jail if I had anything to do with it. I was rather dogmatic in my position, but one day everything changed for me.
>
> Another day in Justice court brought another Class B misdemeanor of domestic violence, but this time the wife showed

up. Unfortunately, it was in support of her husband and not against him. While her husband waited in the hallway I had a conversation with the victim where I tried to convince her that her husband had broken not only a criminal law, but a moral one as well Before I could finish she interrupted me with a sharp "Why don't you grow up." I couldn't believe it.

Here I was an [older] law student with all the knowledge in the world and I was being challenged by an undereducated housewife (I was truly arrogant). She explained to me that "our" world was not black and white and that sometimes husbands and wives experienced problems and that I should just respect her wishes and let her and her husband go home. She concluded that "sometimes good people do bad things." In her eyes, he had changed over the several months since the charges were filed. To support her contentions she informed us that her husband had attended counseling and was attempting to improve his disposition voluntarily through professional help.

The outcome of the case was a plea in abeyance and anger management classes. The outcome for me though was more profound. On that day I changed the filters on my lenses to the world. I believe that I could have convicted the defendant easily, but because the wife asked me not to I didn't. The supervising attorney had to clear this, but he believed that the defendant was sincere in his remorse and was confident that the violence would not be repeated. I know we were taking a chance, but I am convinced that we did the right thing. Even though I am married, and even though I consider wife battering reprehensible, I still listened to this person and feel fortunate that I did.

On that day I understood that I no longer had a lock on morality. Since then I have lived with the notion that sometimes good people do bad things; a notion, I believe, that motivates defense attorneys.

Before I was given my lesson in human relations by that wise and compassionate woman, I viewed defense attorneys as "big fat arrogant bleeding hearts" whose only purpose was to im-

> pede real justice. . . . Fortunately, my education came at the hands of a victim and not a defense lawyer. . . . Because I took the time to listen to that victim, I adopted a new orientation towards the opposition that includes careful listening, cooperation and respect.

While the two-dimensional world view changed for that student so he came to see defendants in more complex ways, another prosecution student's world view was shaken by seeing law enforcement officials also do wrong:

> What an eye opener this clinic has turned out to be for me. At the beginning of the year, I chose the prosecutor clinic with a certainty that, in retrospect, surprises me now. . . . I believed strongly that the State is society's white knight; its sword in the face of wrongdoers; the lone champion of all victims who'd ever been wronged by some despicable criminal somewhere. In short, I was pretty damn naive.
>
> Over the course of the last nine months I have been sufficiently involved in the administration of justice to see the darker side of the State's handling of criminals. I have learned that cops *do* lie, and that some of the assistant district attorneys have a value system as loathsome as the defendants they snidely deride. I have to admit that when I learned these things first hand, my jaw dropped like the kid who has just learned the truth about Santa Claus. I suppose I should be more grown up about it, but it hurt a little bit to learn the truth about an institution I'd previously held in such high esteem.

Yet his conclusion was not defeatist; he presented a theoretical framework that required public servants to take their public service seriously:

> My point has been to show that, as agents of the government, these people should operate according to a higher standard of conduct, but many are not. I recognize that they are human beings, like the rest of us, and subject to the same human frailties as the criminals they arrest and prosecute. But these people are charged with a special obligation. . . . Because the State. . . is acting on behalf of the people who've been

> wronged, I believe the State should act in a manner that affords dignity to the people it represents.

Other students were introspective regarding their personal reactions to the "thrill of victory and the agony of defeat." Prosecutor students explored how to deal with their personal need for order in their work and their devotion to law and order in dealing with others:

> Five minutes before the [juvenile delinquency] trial was to begin, defense counsel asked for a meeting in the judge's chambers. There, defense counsel disclosed that his client had a severe drug problem and that she wanted help but could not afford such help on her own. Evidently presuming the drug paraphernalia and dangerous weapon allegations would not be proven, defense counsel proposed to admit to the disorderly conduct allegation in exchange for the assurance that the judge would admit the youth into a state funded drug rehabilitation program. I remember sitting in the judge's chamber not believing that defense counsel was so assured at my incompetence that he would make such a proposal to cover his client when I would, inevitably fail to convict. Furthermore, I was offended at the notion that limited state resources would be spent on 'this girl' without her having to take actual responsibility for the more serious allegations before her. Although I did not say a word, the judge must have sensed my reaction to defense counsel's proposal because he quietly turned to me and said, "Remember. . . the most important thing here is to ensure this minor gets all the help she needs to rehabilitate."
>
> I have to admit it took me a few days to understand the wisdom of this judge's statement. I finally realized that I had been so caught up in my own performance and the fact that I thought [the minor] should not receive assistance unless found guilty of the drug charges, that I had lost sight of the juvenile court's purpose, namely, to rehabilitate juveniles to become productive citizens; I realized that this trial was not just another competition—like debate, Moot Court and Trial Advocacy had been—rather [the juvenile] is a minor who needs and is willing to accept help and to rehabilitate herself.

> Therefore my job as a prosecutor was not to protect my own ego nor was it to go for the jugular—or to make [the minor] suffer as much as possible—rather, a prosecutor must be fair and aid in justice being found and served.

Another prosecutor student explored similar feelings about winning and losing:

> The clerk of the court said 'Guilty' and that's exactly how I felt. I had just finished a case that I'd been working on for five months, . . . and the clerk had announced that the jury found the defendant guilty. I was happy — and I was guilty. Part of me just felt badly about how the rest of me felt. I've always wondered about how I would react to 'wins' and 'losses' in the courtroom, and perhaps the most good the Criminal Clinic has done for me this year is to help me learn how I would react and how I should react.
>
> Our criminal justice system requires attorneys to place such a personal stake in the outcome of cases that it is extremely difficult not to look at those outcomes as wins and losses. I think that's sad, I think it leads in great part to the egos that turn many people off about attorneys, but it's also understandable. When I look back at this year, I think of two cases as typifying this lesson for me—one case I won and one case I lost.
>
> The case I lost was a loser from the start. . . . I made an opening statement to the judge, I did all the directs and crosses, and I made a closing argument . . . I did all I could, and I lost. . . . I knew all along that the judge might have trouble with reasonable doubt, but I wasn't prepared for the feeling that I had lost. Somehow, when the judge said "Not Guilty" I felt like he was critiquing my performance, like I had somehow failed. I actually thought, "Gee, maybe I won't be a very good attorney." I was slightly embarrassed to go before the judge the next time after that trial because I felt like he would be viewing me skeptically, critically. I knew that our case was inherently weak (although I thought he was guilty) but for some reason that weakness didn't allow me to simply feel that I had done my best and had represented the government well. Instead, I felt like I had let the government down.

I felt like the judge's verdict was aimed as much at me as at the defendant and the case. I made too much of the outcome of the case. I know that now and I knew that then, but I made too much of it nonetheless.

And then there's the case I won. It was a great case. . . . After about two hours the jury came in. The defendant stood up, the judge gave the clerk the verdict form and the clerk said "guilty." I was happy. I didn't show it, but I was happy. The judge thanked and dismissed the jury. We talked to some jury members and they told what a good job I had done and how they thought I'd be a fine attorney. I was happy.

Then I saw the defendant. I saw his wife crying. She just couldn't believe that her husband had been found guilty. . . . she had testified about how her husband had lost his job, . . . and about how their lives had been devastated. She was real and so was their pain. Her husband, the defendant, wasn't even that bad a guy. He'd just lost his temper. . . and had gone a little crazy for 15 or 20 seconds—and he'd changed his and his family's lives forever.

A Class A misdemeanor is not all that serious. There isn't even any jail time involved. Just a fine, restitution, and probably probation. They were devastated. As I would be. That's probably just another sign that this wasn't something these people were used to. They were devastated, and I was happy because I had 'won the case.' I had proved myself. My worth was vindicated by that verdict. The jurors liked me. I had done well. And I realize that I had made too much of this victory, just as I had made too much of my previous defeat. . . .

I've made too much of these highs and lows, success and failure, wins and losses. But, for me at least, it was real and perhaps that's the greatest lesson I've learned during law school. I think the feelings will always be there—feelings of vindication and victory, of failure and loss. Of course, there's nothing wrong with this. Attorneys are human and they put a lot of time into cases so it's natural that they would come to feel a personal stake in the outcome. I guess I was just a little both-

> ered both by the failure of 'not guilty' and by the elation of 'guilty.' Thankfully, this Clinic has also provided me with several great role models after whom to pattern my own behavior.
>
> In [my supervisors] I've had the benefit of watching individuals intent on seeing justice done, whether or not that results in a conviction. I've seen people for whom the 'wins' and the 'losses' are not nearly as important as a job well done.

Both students gained important insights into their responsibilities as prosecutors and their (natural) tendencies to incorrectly approach this important work as a "contest" between winners and losers rather than as a public service in which justice is their sole aim.

CONCLUSION

In their class discussions and their reflective papers, the students focused upon what had happened in the courtroom or the law office and what had been said by judges, attorneys, defendants and witnesses. They complied with the programmatic request to reflect upon what they learned—not just about the law or the skills of a criminal trial attorney, but about the system of justice they encountered and about their own feelings. The excerpts provided above demonstrate the nature and variety of these reflections and demonstrate that our students did think critically about many of the issues raised in the classroom component. Nevertheless, it is impossible to know what effect the classroom readings and discussion may have had or whether there was an identifiable benefit of having both prosecutor and defender students studying and reflecting about their experiences together.

While theories about clinical education and adult learning support using extern clinical experiences to explore personal and professional satisfaction, the students' own words and thoughts provide the best proof that it is well worth the effort. There is no guarantee that these students will have consistently happy and successful careers in the practice of criminal law. However, having learned to reflect upon their experiences and

their philosophies of practice, they are better prepared to face the challenges of the future.

COMMUNITY PROSECUTION: CAN A LAW SCHOOL PROSECUTORS CLINIC ADOPT THIS APPROACH?

Lisa C. Smith[*]

More than a decade ago Brooklyn Law School (hereinafter the Law School or BLS) created the Prosecutors Clinic. A year long, in-house clinic, it allowed third-year students to work as first-year Assistant District Attorneys (ADAs).[1] They prosecuted misdemeanor cases from the Office of the Kings County District Attorney in Brooklyn, New York.

I. Brooklyn Law School Prosecutors Clinic: The Early Years

A. Clinic Structure

The Prosecutors Clinic was divided into three components: case conferences, a weekly seminar and courtroom appearances. The students, working in teams of two, were responsible for about five cases at any one time. The cases were assigned to the students immediately after arraignment, which occurs within twenty-four hours of the arrest. In New York City (NYC), almost all crimes result in detention. The defendant is fingerprinted, photographed and sent to the arraignment,

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The author would like to extend her appreciation to Professor Hans Sinha and the *Mississippi Law Journal* for the opportunity provided by this issue.

[1] The author would like to thank Professor Stacy Caplow, the creator of the Brooklyn Law School Prosecutors Clinic, for her constant support and encouragement of innovative ideas.

where an attorney is immediately assigned.[2] The Kings County District Attorney's (DA's) Office then sets aside cases specifically for the Clinic.[3]

The clinic's first component, the weekly seminar, was originally designed to address criminal practice and procedure. The first class began with the drafting of accusatory instruments, and the semester continued with interviewing, plea bargaining, bail, discovery, fact investigation and motion practice.

The case conferences were usually two hours long and focused on the teams' pending caseloads, topics discussed included the theory of the case, prosecution strategies, counseling of witnesses and negotiating.

As to the third component, the students were responsible for all court appearances in each and every case to which they were assigned. Ultimately, the students were responsible for the final disposition, whether through a plea or trial. Although very few misdemeanor cases are tried, the Clinic students have had a few such trials. The students were always anxious to have the opportunity to go to trial; so when I first began teaching, I tried to select cases that seemed most likely to survive the plea bargaining process. I knew from experience that defendants on probation and parole rarely took pleas, because doing so might violate that sentence and land them back in prison. I attempted to locate cases in which there was less likelihood that a defendant would fail to appear in court, thus causing a bench warrant to issue. I also tried to locate cases in which the victim seemed very insistent about the particular outcome of the prosecution, reducing the likelihood of a plea. None of these strategies worked, and, after many years, I realized that random selection of cases was just as

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[2] In New York City, a judge is always present at the arraignment. Bail is discussed, and there is plea bargaining. In Kings County, forty-seven percent of the cases were pleaded out at arraignments in 2004. Statistics provided by the Office of the Kings County District Attorney. Jerry Schmetterer, Director of Public Information, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York, 11201. Phone: 718-250-2000.

[3] The types of cases selected will be discussed in the body of this article.

likely to produce a trial.

B. The Setting

Brooklyn, New York, is a county of approximately 2.5 million people living in seventy-one square miles.[4] It is a county of neighborhoods divided by age, religion, socioeconomic conditions and ethnicity. Almost thirty-eight percent of the county is foreign-born, with 200 different ethnic groups.[5] More than 100 different languages are spoken in the many communities.[6] There are twenty-three police precincts covering the county. It is home to very large cultural institutions, eight colleges and one law school. There are communities of every economic class, with twenty-nine percent of families with children under the age of eighteen living below the poverty level.[7] In Brooklyn, forty-six percent of the population speaks a language other than English at home.[8] A decade ago, the Office of the Kings County District Attorney and the Law School were located next door to each other in a neighborhood known as "Downtown Brooklyn." Today, the Kings County District Attorney's Office is one block away from the Law School. The area includes all of the courts in the County, including the Family, Housing, Criminal, Surrogates, Matrimonial and Supreme Courts. The Supreme Court includes both the civil and criminal terms and has criminal trial jurisdiction over felony cases. Misdemeanor cases are prosecuted in the Criminal Court. The Appellate Court and the Federal Court are also located in the same five-block area. Many of the county social service agencies are housed in a variety of buildings in and around Brooklyn Law School. This centralization of all

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[4] Statistics provided by the Office of the Brooklyn Borough President and the Federal Census Bureau. Office of the Brooklyn Borough President, 209 Joralemon Street, Brooklyn, New York, 11201. Phone: 718-802-3700. United States Census Bureau has a searchable database of population statistics available at http://factfinder.census.gov/home/saff/main.html?_lang=en.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

government agencies and courts within one square mile is often criticized by residents of other neighborhoods.[9] It is against this backdrop that the Prosecutors Clinic operates.

C. Case Selection

In the late 1980s and very early 1990s New York City was in the midst of a horrific crime wave. In 1990, 158,000 felony crimes took place in Brooklyn. The breakdown was as follows:

- auto larcenies-19,000
- rapes-1154
- assault-16,000
- robberies-37,000
- burglaries-39,000
- other felony crimes—approximately 40,000.[10]

There were 765 homicides that year alone.[11] Prosecution offices faced with scarce resources were forced to choose to indict some felonies and reduce other felony cases to misdemeanors, prosecuting them in the lower criminal courts.[12] In New York, the Penal Code allows for twelve jurors in a felony case, but only six in a misdemeanor prosecution.[13] Differences also abound in speedy trial requirements and sentencing.[14] The maximum sentence in a misdemeanor case is one year, with many alternative probation and community service options. Therefore, the misdemeanor courts see a great deal more plea bargaining. Consequently, the prosecution of misdemeanors is much faster and simpler. Resource decisions were based on many factors, including the seriousness of the crime, the defendant's record, the strength of the evidence and witness cooperation. As those cases were reduced to misdemean-

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[9] *See* Sarah Glazer, *Community Prosecution*, CONG. Q. RESEARCHER, Dec. 15, 2000, at 1011, 1011.

[10] Statistics provided by the New York Police Department Crime Analysis and Program Planning Section.

[11] *Id.*

[12] Having worked as an Assistant District Attorney from 1979-1987, when assigned to the Intake Bureau, I made these resource decisions on a daily basis.

[13] N.Y. CRIM. PROC. § 270.05

[14] N.Y. CRIM. PROC. § 30.30.

ors, they became available to the students in the Prosecutors Clinic. Thus, a third year law student in the Brooklyn Law School Prosecutors Clinic could prosecute a variety of cases such as those involving auto theft, rape, child abuse, assaults with injuries involving as many as 100 stitches, commercial burglary or even drug sales. As the crime wave continued, the District Attorney's office remained resource poor, resulting in a continuous reduction of felony prosecutions to misdemeanor charges. Along with these reduced felonies, the average student caseload included a few actual misdemeanors such as shoplifting, driving while intoxicated (DWI) and prostitution.

II. Prosecutors Clinic and Domestic Violence

A. Case Selection

Domestic violence and child abuse cases were also among the misdemeanor arrests, but, they rarely survived the second court date and were therefore unavailable for assignment. Until approximately 1996, a student in the Kings County Criminal Court would routinely see the domestic violence case called and a victim step forward. The alleged abuser would be nearby, and the victim would announce that she wished to drop the charges. The judge would then inquire as to whether she was coerced or threatened into the dismissal, and she would, of course, respond in the negative. The judge would then dismiss the case. I rarely saw a case survive to a third court appearance.

In the mid-nineties the crime wave in the city began to abate, the decline continuing to this day.[15] With that crime drop the policies in the Kings County District Attorney's Office began to change, with far fewer felony arrests being reduced to misdemeanors. This eliminated the burglaries, larcenies,

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[15] According to Statistics provided by the New York Police Department Crime Analysis and Program Planning Section, at the end of 2004, there were 231 homicides in the county. In 1990, one out of fifteen persons was a victim of a serious crime, and, in 2004 one out of sixty was a crime victim. In 2004, there were 42,000 serious crimes, a seventy-three percent decrease from the earlier described statistic.

robberies, and rape cases available for assignment to the Prosecutors Clinic as those crimes were now being indicted. Without those cases, misdemeanors such as shoplifting, drug possession, prostitution and DWI became the majority of the clinic's caseload. At the same time, the criminal justice system and the legislature began to focus on the area of domestic violence. This resulted in large part from the work of domestic violence advocates. In 1996, New York became a "mandatory arrest state," creating a startling increase in misdemeanor assault arrests for domestic violence.[16] In the late 1990s, the Kings County District Attorney's Office prosecuted almost 11,000 domestic violence cases per year.[17] As a result of my own personal commitment to that area of law, and the precipitous drop in serious crime, the clinic began to focus on domestic violence prosecutions. Domestic violence cases always include victims in need of interviewing and counseling. They afford the student an opportunity to learn a great deal about prosecution strategy, creative motion practice and evidence collection. Courtroom argument with defense attorneys is aggressive because the defense, aware of the likelihood that a domestic violence victim will ultimately drop charges, rarely accepts a plea offer. This gives the student the opportunity for many court appearances, much plea bargaining and some argument before the court. To my mind, domestic violence cases still provide the best pedagogical experience for the clinic student. Over the years, many colleagues have told me that they would never handle domestic violence or child abuse cases in a clinical setting. They cite the difficulty in working with the victims and the inherent danger in giving students the responsibility for those cases. At the same time, many DA's offices are unwilling to allow a clinic to handle their domestic violence cases, fearing the exact same issues.

The Prosecutors Clinic was also awarded a Violence Against Women Act (VAWA) grant from the Office of Justice

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[16] *See* N.Y. CRIM. PROC. §§ 140.10(4) & 530.11.

[17] Statistics provided by the Kings County District Attorney's Office, Domestic Violence Bureau. Phone: 718-250-3300.

Programs. This grant intergrated appearances in the Family Court and the Criminal Court on behalf of domestic violence victims. The students worked on civil orders of protection, support and custody issues and the criminal prosecution of domestic violence cases.

B. Problems with Student Burnout

The rate of dismissal of misdemeanor domestic violence cases is very high in almost all five counties in NYC.[18] The disposition in most of these cases is rarely a conviction for a misdemeanor and even more rarely a sentence of jail time.[19] The Prosecutors Clinic student handled about five to seven cases at any one time. With a small caseload and a great deal of time to reach out to the domestic violence victims, the results were not markedly different from the experience of the Domestic Violence Bureau in the Kemp County DA's Office.[20] Although the students clearly understood the issues and pressures facing victims of domestic violence, they found it difficult to see so many cases proceed to dismissal. Victims often appeared annoyed at their phone calls, insistent offering of assistance and visits to the home. Although the students were simply trying to handle each case in a responsible manner, it did not always feel that way to the victim. The students often wearied of the lack of cooperation and sometimes outright hostility. I decided to re-think focusing exclusively in this one area.

III. The Brooklyn Law School Community Prosecution Clinic

Students at Brooklyn Law School come from all over the United States. In the early years of Brooklyn Law School, it was considered a commuter school. This began to change, and

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[18] Statistics provided by the Office of Court Administration, Administrative Judge for the New York City Criminal Courts. Phone: 212-374-5880.

[19] *Id.*

[20] A discussion of this is being saved for my next article.

as the student body shifted, their knowledge of Brooklyn and its communities diminished too. The students live primarily in the neighborhoods within walking distance or a very short subway ride to the Law School and rarely venture, if ever, into many of the neighborhoods in Brooklyn. In fact, the vast majority live in about eight of the twenty-three precincts. Therefore, at the outset of any school year, the students in the Prosecutors Clinic have no visual, historical or cultural sense of the neighborhoods in which their cases occur. In addition, language barriers and the 200 different ethnic and immigrant groups cause the problems to multiply. Teaching empathy, social justice and cultural competence was a daily struggle. Additionally, the lack of familiarity with each neighborhood made it difficult for the students to understand why a particular type of misdemeanor deserved attention. Why does graffiti matter? Shouldn't prostitution, "the world's oldest profession," be legalized? Why should they waste time on low-level drug possession? I decided to re-think the focus of the Prosecutors Clinic and began focusing on how to address these problems, provide the best pedagogical experience and consider student burnout. The concept of a community prosecution clinic emerged from these issues.

A. Sunset Park: The Setting

This year, students worked with the Sunset Park community, a neighborhood whose population represents virtually every age, socio-economic and ethnic group. Sunset Park was a traditionally Irish-Italian-Norwegian working-class neighborhood that eventually became largely Hispanic, and now has a burgeoning Asian population. There is a large industrial zone employing a significant percentage of the neighborhood. "Mom and Pop" businesses populate two shopping avenues; churches abound; and a multitude of social service agencies exist.

Sunset Park was selected for a variety of reasons. The first consideration was proximity to the Law School. Since few of our students own cars, there had to be easy access to public transportation. The clinic students would also be expected to visit the neighborhood in the evening, which also had to be

taken into consideration. Selecting a community with a heterogeneous population and a need for our services was also of paramount importance.

Crime has been on a steady decrease in this area, mirroring the entire county and the city. However, there are still many misdemeanor and felony arrests. Domestic violence remains a major problem in this area. The industrial zone is deserted at night and a few strip clubs and adult video stores have sprung up, providing a comfort zone for prostitution. The shopping avenues wage a constant battle with graffiti, drug dealing and commercial burglaries. The area has many private homes along with some large apartment buildings. Many of these homes have been converted into three-family dwellings. Residential burglaries are therefore a problem, and DWI's also commonly occur.

B. Structure of the Clinic

The three-component structure of the Clinic remains the same. The students are assigned in teams of two and handle about six cases at a time. There is a two-hour weekly case conference and a weekly seminar. The cases come from arrests made by the 72nd Precinct in Sunset Park.

The structure of the clinic allows the students to come to know and understand the concerns of the neighborhood. We began the year with a walking tour of the area, led by the Director of the Community Board. He also gave us an overview of the community and the board's most significant concerns. Our next meeting was with the Fifth Avenue Merchants Association. There, the students had an opportunity to hear about the retail establishments in Sunset Park and their business issues. On another day, the Director of the Southwest Brooklyn Industrial Zone explained the problems faced by manufacturers in Sunset Park. Such concerns included their need to keep that area safe for their workers, encouraging the businesses to stay in Brooklyn, providing jobs for the local residents and revenue for the City. Our next visit was to a community group, the Center for Family Life, which provides counseling to victims of domestic violence and families in

crisis. On another occasion, we spent a day with the Brooklyn Chinese American Council learning about the concerns of the many Asian immigrants in Sunset Park and visiting their vibrant merchant strip.

At the outset, the students are assigned to attend community meetings in Sunset Park. The students attend the 72nd Precinct Council, Community Board, Human Services Cabinet and Public Safety meetings. These are often in the evening; thus, the schedule for the entire year of meetings is provided at the beginning of the year long clinic. Since Sunset Park is not far from Brooklyn Law School, the students can arrange transportation on their own. The assigned student takes minutes at these meetings and then distributes them to the clinic to be discussed in our next seminar meeting. By attending these meetings, the students get a first-hand understanding of the dynamics and problems of this community.

C. Case Selection

The Domestic Violence Bureau and a Trial Bureau in the Kings County District Attorney's Office set aside 72nd Precinct misdemeanor cases for the Brooklyn Law School Prosecutors Clinic, post arraignments. I then attempt to insure that each team is assigned some cases involving victims, enabling them to learn interviewing and counseling techniques, as well as some quality of life crimes. The caseload includes crimes such as domestic violence, sexual misconduct, shoplifting, DWI, assault, drug possession, prostitution and graffiti.

IV. Advantages to the Community Prosecution Model

There are numerous benefits to a prosecution clinic working within the community prosecution model.

A. Practical Benefits

In a large urban setting, the bureaucracy of the criminal justice system can be daunting for the law students, the victims and the professor. By prosecuting only arrests from a particular neighborhood, cooperation increases between the

traditional players in the system. For the most part, the cases will only involve police officers from one precinct. After a time, the students come to know the officers and gain their cooperation in returning phone calls, appearing for interviews and court dates. As the police officers are patrolling Sunset Park on a daily basis, they can assist the students by checking up on witnesses and complainants. At the monthly precinct council meetings, which are presided over by the Commanding Officer of the precinct and attended by many of his subordinates, the clinic representative can address issues the students are having with any officers in the precinct.

The community prosecution model also increases the cooperation between the victims, other witnesses and the Clinic. By attending monthly meetings, the Clinic students come to know many members of the community who can assist in reaching out to those involved in our cases. The students are more at ease when interviewing the victims. The victims are more at ease with the students because of their understanding of the setting of the crime and ability to discuss locations and streets in a comfortable fashion. There was no longer a blank look from the student when a victim was trying desperately to describe the scene.

As previously described, a large percentage of Brooklyn's population does not speak English, including those in Sunset Park. Instead, the primary languages include Spanish and a variety of Chinese dialects, including Mandarin, Cantonese and Fukkianese. Finding interpreters for the cases is very difficult. By working closely with the community, the Clinic has come to know many of the social service agencies. Their staff frequently cooperates with the Clinic and acts as our translators. The students can then go to the agency and meet with the victim nearer to his or her own home, in a location with which the victim is more comfortable.

B. The Students

The ultimate goal of the BLS Prosecutors Clinic is to teach the role of the prosecutor, "to do justice" in an innovative way. Justice needs to be understood as applying to both

victims, defendants and the community as a whole. The community model helps the students understand the needs of these parties by better understanding the people with whom they are working and their everyday concerns. This clinical experience transforms prosecution from managing a caseload in a purely reactive mode into a model that has a direct relationship with and impact on the life of the community.

As a result, the two student issues previously discussed, burnout and detachment, are no longer problems. The students have a greater understanding of the community and its residents. This is evident both in the seminar and in their discussions of the community meetings. They often scour the newspapers for articles about Sunset Park, concerned with troubling reports and delighted with good news.

Student reaction to this Clinic has always been positive, and every year there are many more applicants than available openings. This has created many problems in terms of student resentment, and I have been told many times, "I am paying $30,000 a year to come here; therefore, I should be able to take the clinic that I want." Over the years we have addressed this issue in numerous ways, gradually increasing the number of student slots from eight to eighteen by hiring an adjunct instructor who is a prosecutor in the Kings County District Attorney's Office. One year when demand was incredibly high, we created a hybrid clinic. We placed half the students in the first semester in an in-house clinic setting. The other half of the students were placed in the Kings County District Attorney's Office in an extern-like setting and worked with a variety of ADAs. Both groups attended the seminar together. The current enrollment is eighteen with an adjunct instructor.

C. The Law School

From the perspective of the Law School, a Community Prosecution Clinic provides an opportunity to engage a neighboring community with a substantial outreach effort, thereby breaking down some of the barriers between the school and its surrounding neighborhoods. It also provides an opportunity for student associations at the Law School to interact with the

Clinic and with a neighborhood. For example, the Brooklyn Law School Latino Student Association and the BLS Asian American Law Student Association have been involved with the evolution of the Community Prosecution Clinic.

D. The Sunset Park Community

The Clinic provides numerous benefits to the people of Sunset Park. The most obvious benefit is that their prosecutions are handled by a clinic where each student has five cases as opposed to an Assistant District Attorney with a typical caseload of 100. We are therefore able to pay much closer attention to insuring that the appropriate plea and sentence are negotiated. Students also pay very close attention to the needs of victims of domestic violence and their children. If restitution is appropriate, the student sees that it is ordered by the court and is responsible for monitoring that case to closure.

As a result of working with advocacy groups and social service agencies, victims can be provided services near their homes as part of the case management. Our case conferences always include a discussion of other legal issues perplexing our victims and an attempt to resolve the problem. We can frequently point the victim to a local agency willing to work with the family, a decision that works equally well for the defendants. In the misdemeanor cases where a variety of treatment options are frequently part of the sentence, the Clinic students are able to suggest actual neighborhood based providers to the court. This makes excuses less acceptable to the presiding judge, for example, that language barriers, location, hours and cost are preventing the defendant from getting the help needed.

V. DISADVANTAGES: TIME, TIME, TIME

This type of clinic also presents several disadvantages. The greatest disadvantage to directing a Community Prosecution Clinic is to the professor teaching the Clinic, no small matter to the readers of this article. The problem is in the

amount of time needed to insure the proper prosecution of the cases and involvement with the community.

The community meetings are very time consuming, requiring many nights of attendance. In the fall, at the beginning of the semester, I attempt to attend as many meetings as possible with the students. As the semester progresses, students attend on a rotating basis and report back. The optimum situation is for the professor to attend every meeting with the Clinic student, providing visibility in the community and an opportunity to interact with community leaders. However, with one community meeting almost every day in Sunset Park, that is impossible.

Professional relations with the law school may suffer, as well. Sunset Park is a short distance from the Law School, and, in order to participate in the life of the community, it is necessary to be there on a routine basis. This means that there is a good deal of time spent away from the Law School community, which is a problem for any faculty member and likely worse for clinical faculty, who may miss Law School meetings from time to time as a result of this issue.

Case conferences are even more time consuming. The victims, more comfortable with the Clinic because of our presence in the community, very likely may ask for assistance with a multitude of legal issues. The students are instructed to attempt to assist with these problems by, at the very least, providing another referral.

Limited time may also affect topics covered in the seminar. The seminar must focus on criminal practice, as the students are handling a misdemeanor caseload and have varying degrees of experience in the criminal justice system. The seminar must also include information about the community. While some of the classes are devoted to reporting on community issues, there is not enough time in the semester to adequately cover both areas.

In addition, the community at large places time constraints on the Clinic. The community comes to view the Clinic as the community law firm and brings many issues to our attention with a request for assistance. These have included

sanitation, waste management, environmental, landmarks, zoning, section 8 and housing, gentrification, education and insurance. The Clinic is not equipped to advise on most of these topics; thus, I try to provide referrals as often as possible.

CONCLUSION

The evolution of the BLS Prosecutors Clinic from a general misdemeanor Clinic to the BLS Community Prosecution Clinic has been an enriching experience. My goal in this Clinic is to teach the role of the prosecutor while at the same time providing an expanded vision of social justice, cultural competence and creative approaches to the legal system. The outcome of this dual approach will hopefully produce prosecutors who truly understand their mandate "to do justice."

PROSECUTORIAL EXTERNSHIP PROGRAMS: PAST, PRESENT AND FUTURE

Hans P. Sinha[*]

INTRODUCTION

The history and development of clinical legal education has been thoroughly documented.[1] After the demise of the apprenticeship system to train young lawyers in the actual practice of law[2] and the ensuing domination of the case opinion pedagogical method, brought about by the influence of

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[1] *See, e.g.*, Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5, 12, 32 (2000) (discussing the "three waves" of clinical legal education, to wit, "The Birth of the Modern Law School and the First Wave of Clinical Legal Education," "The Maturing of the Modern Law School and the Second Wave of Clinical Legal Education," and "The (Sometimes Uneasy) Present: Defining and Refining the Role of Clinical Studies in the Law School Curriculum.").

[2] The history of legal education in America "began with the apprentice system. The prospective lawyer 'read law' in the office of a practicing lawyer." Jerome Frank, *Why Not A Clinical Lawyer-School*, 81 U. PA. L. REV. 907, 909 (1933); *see also* LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 97 (2d ed. 1985) (noting that "[t]he road to the bar, for all lawyers, was through some form of clerkship or apprenticeship."). Interestingly, the pros and cons of the early apprenticeship parallel those of externships today in that "[h]ow much the apprentice learned depended greatly on his master." *Id.* at 97-98.

Christopher Columbus Langdell,[3] the value of clinical legal education may have been doubted by encased doctrinal academicians.[4] However, beginning with the emergence in the early twentieth century of criticism aimed at the failure of law schools to teach the actual practice of law,[5] the importance of clinical legal education as a whole began to be, if not generally applied, at least accepted.[6] Today, virtually every law school has some sort of clinical legal education offering for their students.[7] Indeed, law schools today are mandated by Standard

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[3] Langdell, the first dean of Harvard Law School, brought the appellate case method to American legal education beginning in the 1870s. Frank M. Coffin, *The Law School and the Profession: A Need for Bridges*, 11 NOVA. L. REV. 1053, 1054 (1986). Whatever the benefits of this system may have had on the education of lawyers, it did lead to "a distancing of the law school from the profession." *Id.* at 1055. According to the Langdellian theory of legal education, "the exclusive repositories of the wisdom which law students must acquire to make them lawyers" could be found in the opinions of judges. Frank, *supra* note 2, at 907 (emphasis removed).

[4] *See* Barry et al., *supra* note 1, at 8 (discussing conditions leading to "[t]he dearth of clinical legal education programs in the first half of the twentieth century," including that "law school teachers of this era disagreed about the value—and feasibility—of teaching lawyering skills other than legal analysis.").

[5] *See generally*, *id.*; *see also*, William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591, 592 (1917) (arguing that "[t]he radical changes in the conditions and methods of legal practice and professional office-work have now made the adequate provision for clinical training and experience the most essential part of legal education."). See also Frank, *supra* note 2, as well as a second article Frank published twenty years later, criticizing law schools for being "[h]ypnotized by Langdell's ghost" and calling for each law school "to build its teaching around a legal clinic." Jerome Frank, *Both Ends Against the Middle* 100 U. PA. L. REV. 20, 29 (1951). *See also*, John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252, 276 (1928) (discussing the development of the Legal Clinic at the University of Southern California and concluding that while much experimentation needs to be done, "the clinic has a place" in legal education).

[6] Legal aid clinics began as early as 1913 at Harvard, Minnesota and Northwestern, followed by Yale, Cincinnati and Southern California in the 1920's. Quintin Johnstone, *Law School Legal Aid* Clinics, 3 J. LEGAL. EDUC. 535, 541 (1951). Duke, Cornell, Ohio State, Maryland and Wisconsin established clinics in the 1930's. *Id.* By 1951, twenty-eight law schools had "some kind of legal aid clinic." *Id.* at 535.

[7] In 2002, 127 schools offered some sort of in-house live client clinical opportunities for their students, and 147 schools offered at least one externship clinical opportunity. *A Survey of Law School Curricula: 1992-2002*, 2004 A.B.A. SEC. LEGAL EDUC. ADMISSIONS 34-35.

302 of the Standards for Approval of Law Schools of the American Bar Association (ABA) to offer "substantial opportunities for . . . live-client or other real-life practice experiences."[8] Such "experiences may be accomplished through clinics or field placements."[9] Today, few if any academicians, whether disciples of Langdell or pure clinicians, take issue with the notion that clinical legal education is and must be a part of the education of American law students.[10]

One of the components of clinical legal education is field placement programs.[11] In 1982, a survey designed to ascer-

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[8] AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 302(b)(1) (2005), *available at* http://www.abanet.org/legaled/standards/chapter3.html [hereinafter ABA STANDARD 302], reads in its entirety:

> (b) A law school shall offer substantial opportunities for:
> (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;

Id.

[9] AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 302-5 (2005), *available at* http://www.abanet.org/legaled/standards/chapter3.html [hereinafter ABA INTERPRETATION 302-5], reads in its entirety:

> The offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client clinic or other real-life practice experience.

Id.

[10] Even the most ardent supporters of the case opinion method presumably do recognize, as indicated by the adoption of ABA STANDARD 302, *supra* note 8, that clinical legal education *shall* be a component of legal education. This does not, however, necessitate an agreement that this component of legal education is perceived as equal to what is taught through the case opinion method. The continuing lack of equality between clinical educators and Langdellian educators at law schools point to a lingering prejudice towards clinicians. See discussion *infra* pp. 1353-57 pertaining to status of clinicians in prosecution clinical programs.

[11] *See* ABA INTERPRETATION 302-5, *supra* note 9. Like a well-loved child, field placement programs are referred to by many names. *See* discussion *infra* pp. 1310-13. This article will use the term "field placement" and "externship programs" interchangeably.

tain the status of clinical field work as a whole indicated the existence of field placement programs at 75% of the 105 responding schools.[12] A subsequent survey specifically dedicated to field placement programs indicated that in the 1992-1993 school year, there existed ninety-eight field placement programs at fifty-eight law schools,[13] while a 1995 survey also focusing on field placement programs, showed that 126 schools had such programs.[14] Indeed, there was a 32.3% increase of placement/externship programs at American law schools between the 1986-87 academic year and the 1990-91 academic year.[15] In 2002, 147 schools offered at least one field placement opportunity.[16] These programs varied from judicial, corporate counsel, law firm, government agency, not-for-profit entity, prosecutor and public defender placements.[17]

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[12] Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 287, 298 (1989) [hereinafter Stickgold Survey]. One hundred percent offered simulation courses while 76% offered in-house clinics. *Id.*

[13] Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 423 (1996) [hereinafter Seibel & Morton survey]. Seibel and Morton had sixty-eight schools respond. Fifty-eight indicated they had field placement programs, seventeen of which provided reports on more than one program. Hence the total of ninety-eight reported programs. *Id.* at 422-23. This equated to 85.29% of responding schools. *Id.* Seibel and Morton noted that this corresponded with the findings of the MacCrate Report that "130 out of 155 schools (83.9%) have externship programs." *Id.* at 422; *see also Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. SEC. LEGAL EDUC. ADMISSIONS Bar 253 (1992 [hereinafter MacCrate Report].

[14] Marc Stickgold & Sue Schechter, *Externship Survey Report*, Clinical Legal Education Association Newsletter, September 1996, at 19 (on file with author) [hereinafter Stickgold & Schechter survey].

[15] MacCrate Report, *supra* note 13.

[16] *A Survey of Law School Curricula*, *supra* note 7, at 35. Note that this constituted approximately 79% of the then one-hundred and ninety ABA approved law schools. *See* American Bar Association, *ABA Approved Law Schools, at* http://www.abanet.org/legaled/approvedlawschools/year.html (last visited May 2, 2005) for listing of ABA approved law schools by year of approval. The one-hundred and forty-seven schools also constituted 96.7% of the one-hundred and fifty-two schools which responded to the Section of Legal Education and Admissions to the Bar survey.

[17] *A Survey of Law School Curricula*, *supra* note 7, at 35. By comparison, out of the 152 law schools surveyed in 2002, 127 offered regular in-house, live clinical

Fourteen thousand eight-hundred fifty-seven students took externship courses in the 2001-2002 academic year.[18] In some ways, field placement clinical legal education may indeed be the area of the current American legal education system which is the most diverse—as it should be. Where students can be placed is, within certain generally accepted parameters,[19] limited only by placement availability and the combined imagination and determination of the students and their clinical faculty.[20]

One component of field placement clinical programs consists of placing students with prosecutor offices. Generally, prosecutorial externship programs place students as externs

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opportunities. *Id.* at 34.

[18] Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?*, 10 CLINICAL L. REV. 681, 693 n.53 (2004) (citing to e-mail from David Rosenlieb, ABA DATA Specialist, to Peter A. Joy (Dec. 19, 2003)). By comparison, 15,385 students participated in in-house clinical courses. *Id.*

[19] What Barry, Dubin and Joy have called the "Social Justice Dimension of Clinical Legal Education," has historically dictated that field placement programs only be established in pro bono, not for profit, or governmental agencies. Barry et al., *supra* note 1, at 12. Skills training is the second dimension to clinical legal education. While the social justice dimension of clinical legal education clearly is served by providing legal aid to the poor and sectors of society otherwise underrepresented and in need of legal services—in a criminal setting typically indigent criminal defense or prisoner's rights, prosecution clinics, whether in-house or field placement programs, also meet the social justice dimension. *See, e.g.*, Karen Knight, *To Prosecute is Human,* 75 NEB. L. REV. 847, 865 (2002) (discussing same and noting that "[t]he conclusion that prosecution is not public service is flawed.")

[20] Assumed in an organization being available as a field placement, are criteria ensuring such a placement being a *quality* placement. It is the development of guidelines and standards designed to ensure the students receive a quality education while at the placements, which separates the modern type of field placement programs from the "mere" apprenticeship system of yore. Indeed, Thomas Jefferson, despite having had an apparently beneficial apprenticeship (he appointed his former teacher, George Wythe, to be the nation's first law professor at the William and Mary College) "voiced strong criticism of the apprenticeship system of legal training," opining that "placing a youth to study with an attorney was rather a prejudice than a help." Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 604, 609 (1981) (citing to Letter to Thomas Turpin, February 1769, *in* 1 THE PAPERS OF THOMAS JEFFERSON 23-24 (J. Boyd, ed. 1950); *see also*, MacCrate Report, *supra* note 13, at 104 (citing to same).

with local, state or federal prosecutor offices. Prosecution externship programs are fairly simple programs to establish in that prosecutor offices exist in some form or another wherever a law school exists. This is true even for schools located in rural areas.[21] Prosecutor offices are traditionally more than happy to accept students as externs, and equally importantly, they normally have sufficiently large and varied case loads to enable students to perform meaningful work and participate in a range of different types of cases. With the exception of students placed in public defender programs,[22] few other field placement options enable students to participate in the preparation and conduct of trials on such a consistent basis as do prosecution externship placements.[23] It is possibly because of these factors that the popularity of prosecution placements grew from just below 100 in 1992 to slightly less than 130 in 2002.[24] The majority of these prosecutor placements are part of a school's general field placement program. For example, out of the total ninety-eight reported field placement programs in the Seibel & Morton survey, only six were identified as specific prosecutor placements.[25]

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[21] While rural areas may lack a broad array of public service placements as can be found in large cities, even a rural school will typically find prosecutor offices, public defenders and judicial placements.

[22] For two student views pertaining to their placements with public defender offices, see Joanne Carter, Essay, *Mixed Emotions: A Law Student's Perceptions While Working at a Public Defender's Office*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 329 (1998) and Greg Dantzman, Essay, *My Externship Experience at the Public Defender's Office in Ann Arbor*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 337 (1998). For a similar essay but from a prosecutor placement perspective, see Meryl Markowitz, Essay, *My Experience at the Eaton County Prosecution Office*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 343 (1998).

[23] *See generally* Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal* Education, 69 NEB. L. REV. 537, 545 (1990) (noting that students placed in settings such as prosecutors or public defenders "will have substantial opportunities to gain trial experience during their externship.").

[24] *A Survey of Law School Curricula*, *supra* note 7, at 35. Figure 9 of such survey, "Regularly Offered Externship Placement Opportunities," shows the number of positive respondents in relation to the particular types of placements in a bar graph format, but does not provide the exact number of schools. *Id.*

[25] Seibel & Morton, *supra* note 13, at 423, 453 "Appendix B: Externship Programs Surveyed." Based upon the titles of the programs listed in such table, six

Although all the above mentioned surveys provide sufficient data to enable extrapolation of the general status of field placement programs dealing with criminal justice placements in recent legal education, they do not provide data specifically geared towards prosecution externship programs. That was the goal of the survey upon which this article is based. It is the first work of its kind to specifically seek information about prosecution externship programs. The article is based upon a six page, forty question long survey,[26] seventy-seven of which were returned by schools from across the country.[27] Although the survey was designed to elicit information specifically about prosecution externship programs, the returned surveys quickly made it clear that the vast majority of schools included their prosecution externship program as part of a general placement program. The information provided, although pertinent to prosecution externship programs per se, thus also provides an overview of externship programs in general. This is how it should be. Externship programs wherein students are placed with prosecutor offices, although unique in certain aspects,[28] are also part of the general genre of field placement programs. The information drawn from this survey and presented in this article can thus be seen to fall squarely among the surveys

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indicate externship programs dedicated exclusively to prosecution placements. *Id.*

[26] *See* Appendix A for a copy of survey.

[27] Seventy-seven surveys in total were returned. However, two schools sent in duplicates, and one school indicated it did not grant academic credit for their placement. Additionally, although there are clear parallels between "true" in-house prosecution clinics and prosecution externship programs, three schools' programs were clear in-house prosecution clinics. These three, as well as one of each duplicate and the no-credit school were excluded, leaving a base of seventy-one "used" surveys. *See* discussion *infra* pp. 1306-08 and note 39.

[28] Not only do prosecution externship programs provide students with great trial exposure, *see* Maher, *supra* note 23, but such placements also provide unique opportunities to explore ethical and professional issues to which students are not exposed to in other placements. *See, e.g.,* Stacy Caplow, *What if There is No Client?: Prosecutors as 'Counselors' of Crime Victims*, 5 CLINICAL L. REV. 1, 10-11 (1998) (noting that "the quasi-judicial role of the prosecutor requiring fidelity to a host of institutional and societal goals and values precludes the partisanship and loyalty owed a client and mandates an allegiance to truth-seeking, impartiality, and objectivity.").

discussed above, providing additional information about field placement programs in general and prosecution externship programs in particular.

THE SURVEY

The impetus for this survey came about when the author moved from the Tulane Law School Criminal Defense Clinic[29] to develop and direct the Prosecutorial Externship Program at the University of Mississippi School of Law.[30] In setting up the program, the author sought as much information as possible from clinicians who already directed similar programs. The author was able to obtain much information, some general in the form of articles from the growing scholarship pertaining to externships,[31] some specific in terms of syllabi and other information provided by clinicians. Still, the wish and perceived need for some sort of central source, which the author could have accessed when creating the parameters of the prosecution externship program, remained. As the author moved from creating the program into the actual running of the program, this perceived need changed from what to do, to what do other

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[29] The author served as a Clinical Instructor with the Tulane Law School Criminal Defense Clinic from 1997 through 2001, as well as Acting Director and Deputy Director of that program at different times during his tenure there.

[30] The author arrived at the University of Mississippi School of Law in July of 2001 and began to develop the Prosecution Externship Program. At such time, third-year students were placed as interns with prosecutor offices through the school's Public Service Internship Programs. The author "carved" out from this general program a specific program devoted exclusively to placing students as externs with prosecutor offices and developing a holistic program including an accompanying class entitled, *The Prosecution Function*. Beginning in the fall of 2004, the author also assumed directorship of the school's Public Internship Program. The different nomenclature of the students placed with prosecutor offices (*externs*) and with other public service offices or attorneys (*interns*), is just that, a mere nomenclature which arose as the result of the author naming his original program as a Prosecutorial *Externship* program. See *supra* note 11, as well as *infra* p. 1312-13, discussing the interchangeability of the terms "externship" and "internship."

[31] *See generally* J.P. Ogilvy & Karen Czapanskiy, *Online Annotated Bibliography of Clinical Legal Education*, *at* http://faculty.cua.edu/ogilvy/Index1.htm (last visited May 2, 2005) for an updated compilation of materials pertaining to clinical legal education, originally published in 7 CLINICAL L. REV. Special Issue (2001).

programs do, including what is the "best" way to do something, and why.[32] With this in mind, the author decided to do what any neophyte should do—ask the sage. In this case, the advice would come from the profoundly wise and eclectic clinical community through a nationwide survey. This survey was conducted in 2002 and 2003. It is hoped that the results of this survey will fill a niche in the ever increasing body of scholarship by focusing upon the current practice of one component of clinical legal education—prosecution externship programs.[33]

DATA COLLECTION METHODOLOGY

Recognizing that asking the right questions is vital in any situation,[34] the survey was designed to obtain as much pertinent information as possible about prosecution externship programs.[35] With the advent of the internet, the initial hope was to be able to be both comprehensive and target oriented. All law school web pages were researched, identifying any

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[32] The mere fact that many programs do one thing the same way does, of course, not equate with such means being the "best" way to do something. However, substantial uniformity in evolution of parameters of programs does indicate a certain general acceptance of how to do something. Implicit in such general acceptance is the notion that if dedicated clinicians through independent experimentation, substantially agree on some conduct of operation of similar programs, such conduct can at least be viewed as having been scientifically developed, tested and confirmed. For a scholarly view of best practices, see J. P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZAGA L. REV. 155 (2002); *see also* Clinical Legal Education Association, *Best Practices for Using Externships*, *at* http://professionalism.law.sc.edu/downloads/text1204.pdf (last visited May 2, 2005).

[33] *See* J.P. Ogilvy, *Introduction to the Symposium on Development in Legal Externship Pedagogy*, 5 CLINICAL L. REV. 337, 343 (1999) (encouraging scholarship pertaining to externship pedagogy).

[34] *See* Robert MacCrate, Remarks at the American Bar Association's National Conference on Professional Skills and Legal Education, Albuquerque, New Mexico (Oct. 15-18, 1987), 19 N.M. L. REV. 1, 85 (1987) (noting that in response to her long time companion Alice B. Toklas' question "Madame, what is the answer," Gertrude Stein on her death bed replied—"Alice, what is the question?").

[35] *See* Appendix A for a copy of the survey questionnaire which was mailed out. Note that although the questionnaire was mailed at two different times and as such had different cover information, the questions remained the same.

school which listed a prosecution externship program or clinic. Information was also obtained from the American Association of Law Schools Clinical Directory.[36] This resulted in a data base of eighty-one extern programs with director names and school addresses. In order to be comprehensive, schools listing any type of prosecution clinic or field placement program were included, regardless of what the individual school might title their program. A survey with a postage paid self-addressed return envelope was mailed to such schools in December of 2002. The surveys were specifically addressed to the person identified as being the person in charge of the externship/clinical program. Several messages were also posted on the LEXTERN listserv.[37] This resulted in a return of thirty-one completed surveys by early spring of 2003.

Preliminary results of the survey, using information compiled from the then returned thirty-one surveys, were presented at the Extern-2 Conference at Catholic University in Washington, DC, in March of 2003.[38] In order to ensure completeness, a second set of surveys was mailed in July of 2003 to all ABA law school deans, asking them to pass along the material to their school's prosecution externship director, or if they did not have a specific prosecution externship program, the school's clinic director. The final tally was seventy-seven returned and completed surveys.

Out of the seventy-seven surveys, two were discarded as being duplicates.[39] One school indicated no credit was offered

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[36] *See* University of Michigan Law School Clinical Programs, *Gateway to Clinical Legal Education*, *at* http://cgi2.www.law.umich.edu/_GCLE/Index.asp (last visited May 2, 2005).

[37] Lextern@lists.cua.edu. The LEXTERN list is hosted by the Catholic University of America and maintained by Professor Sandy Ogilvy of the Columbus School of Law.

[38] The author and Arlene Kanter, Professor at Syracuse University College of Law, co-hosted a presentation at Externship 2—Learning from Experience, March 7-8, 2003, Catholic University, Washington, D.C. wherein the preliminary results, as well as sample syllabi and forms collected through the survey, were distributed. *See Prosecution Externship Survey Results* and *Prosecution Externship Survey Results—Sample Syllabi and Forms* (on file with author).

[39] As each survey response was received, it was assigned a sequential number. *See infra* p. 1310. School twenty-one was a duplicate of school twenty-nine. One

as part of their program.[40] This survey was excluded from the calculations simply based upon it falling outside the "may grant credit" parameter of Standard 305.[41] Finally, three survey returns were determined to be from programs which could only be termed as "true" in-house prosecution clinics, and were also excluded from the data calculations.[42] Although many of the parameters and requirements of a prosecution clinic are similar to those of a prosecution externship program, the survey was intended to bring forth as much material and information pertaining to externship programs. Conversely, even though a school would term their program a "prosecution clinic," if the students were placed in non-law school operated

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of these responses, number twenty-nine, indicated that survey return pertained to the school's in-house clinic. The responses contained in number twenty-one, pertained to their externship program as a whole, part of which included placement with prosecutors. That survey was included in the total results. Similarly, numbers four and seventy-one came from the same school, one from the faculty teaching in the fall, and one from the faculty teaching in the spring. In this case, number four, the first one to arrive was included in the calculations. Regardless if a school's survey return was not included in the calculations underlying the data used in the article, the responses are included in the complete survey responses available on-line, thus making the entire database upon which this article is based, available for peer review. This on-line compilation of all survey returns permits a reader to not only see every response from every responding school, but also in light of each school being assigned a number, track one particular school's answers to all questions. *See* PROSECUTORIAL EXTERNSHIP PROGRAMS: PAST, PRESENT AND FUTURE—SURVEY RESPONSE DATA [hereinafter SURVEY RESPONSE DATA], *available at* http://www.ncjrl.org [publications archive]; *see also infra* p. 1310. In addition to the raw data provided in an on-line format, Appendix A to the article contains a copy of the actual survey [hereinafter SURVEY], and Appendix B contains an alphabetical list of all responding schools [hereinafter LIST].

[40] School thirty-five indicated "0" credit hours in response to question fourteen, i.e., "How many credit hours can a student earn for participating in the externship program." *See* question fourteen, SURVEY RESPONSE DATA, *supra* note 39.

[41] AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(a) (2005), *available at* http://www.abanet.org/legaled/standards/chapter3.html, states that "[a] law school may grant *credit* toward the J.D. degree for courses or a program that permits or requires student participation in studies or activities away from or outside the law school or in a format that does not involve attendance at regularly scheduled class sessions." (emphasis added).

[42] Schools number forty-five, forty-six and sixty-three.

law offices and supervised by regular prosecutors as opposed to by law school faculty, the survey was included as an "externship" program.[43] The total number of survey returns used for comparison and percentage calculation purposes was thus reduced to seventy-one.[44] As noted above, although a school's responses were excluded from the total calculations upon which the article data is based, such a schools' individual responses are included in the complete compilation of responses available on-line for peer review.[45]

QUESTIONS

The survey was divided into three general sets of questions. The first pertained to general school information. This section sought to obtain information about the setting of the school, how large the particular school was, how many types of clinical offerings were provided to the students, whether there were part-time students and which students were permitted to participate in the school's clinical offerings in general and in the prosecution externship program in particular.[46]

The second set of questions pertained specifically to the school's prosecution externship program. These questions were

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[43] This classification, although admittedly not perfect, is similar to the classification criteria of COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-1979 (1979) [hereinafter SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION]. Under their criteria, these programs would fall into category 3(c)—"Placements in a non-school operated law office which do not fall into category (b)" [(b)—"Placements in a non-school operated law office with complete on-the-job supervision by the school personnel in that office"] as far as "Structure," and into category 4(c) as far as "Location," i.e., neither in the law school nor in a non-law school place used exclusively by the program. *Id.* at 1-20-Table 1: General Description of Law School Clinic Programs.

[44] Every effort was taken to ensure correct calculations of the returned information, including reviewing and re-calculating the data again and again. However, with 2,840 different responses to review, as well as answers which at times had to be subjectively classified and categorized, the author acknowledges the possibility of both error and differences in opinions. As such, this information is presented not as a definitive "what is," but rather as an opportunity to review trends and commonalities within one field of clinical legal education.

[45] *See supra* note 39.

[46] *See* questions one through ten, SURVEY, Appendix A.

designed to obtain specific information about the parameters of the prosecution externship program. As such, they explored the types of placements, the academic credit hours and corresponding on-site hours, the process of selecting students who could participate, how grades were assigned, academic requirements including pre- or co-requisites and means to ensure achievement of pedagogical goals, as well as selection, training and communication with the on-site supervisors. Information as to the status of the faculty directing the programs was also elicited.[47] Many, if not all, of these issues touch upon the requirements and suggestions included in the ABA standards pertaining to field placement programs.[48] The final set of questions sought to elicit the same information but in relation to each program's classroom component.[49]

In order to encourage candid and complete responses, the respondents, although asked to provide their names and the

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[47] *See* questions eleven through thirty-two, SURVEY, Appendix A.

[48] AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(e) (2005), *available at* http://www.abanet.org/legaled/standards/chapter3.html, reads in its entirety:

> (e) A field placement program shall include: (1) a clear statement of the goals and methods, and a demonstrated relationship between those goals and methods to the program in operation; (2) adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy the program goals and are sufficiently available to students; (3) a clearly articulated method of evaluating each student's academic performance involving both a faculty member and the field placement supervisor; (4) a method for selecting, training, evaluating, and communicating with field placement supervisors; (5) periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for fieldwork in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate; (6) a requirement that students have successfully completed one academic year of study prior to participation in the field placement program; (7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn four or more academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

Id.

[49] *See* questions thirty-three through forty, SURVEY, Appendix A.

names of their schools on the survey returns, were assured that no individual or institutional information would be used in the presentation of the data. This was, of course, the correct way of collecting and especially presenting the data, some of which asked for subjective information about the schools.[50] However, there is also a benefit of being able to track all answers provided by one individual school. For example, if one school indicated that they used an ABC grade option for their externship program,[51] it may also be interesting to see what grade option that same school used for their classroom component.[52] With this in mind, each completed survey was also assigned a number as it was received. A complete listing of all answers corresponding to such numbers is available on-line.[53] The analysis and breakdown of the raw data is, of course, presented throughout the article. When appropriate, the data is reduced to bar graphs interspersed in the text of the article.

In addition to the raw data available on-line, Appendix A to the article contains a copy of the original survey, enabling a reader to see the exact wording of the question asked, while Appendix B contains an alphabetical list of all responding schools.[54] It is hoped this will enable a reader to assure him or herself of the exhaustiveness of the data in terms of which schools participated in the survey, while also maintaining the confidentiality of the respondents.

EXTERNSHIP OR CLINIC

Clinical legal education is traditionally divided into three categories: in-house clinics, field placement programs and simulation courses.[55] Simulation courses differ from both in-

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[50] *See, e.g.,* question thirty, SURVEY, Appendix A (asking how the respondent would describe the acceptance of the program by the non-clinic faculty).

[51] *See* question nineteen, SURVEY, Appendix A.

[52] *See* question thirty-eight, SURVEY, Appendix A.

[53] *See* PROSECUTORIAL EXTERNSHIP PROGRAMS: PAST, PRESENT AND FUTURE-SURVEY RESPONSE DATA, *available at* http://www.ncjrl.org [publications archive]. *See also supra* note 39.

[54] *See* SURVEY and LIST, *supra* note 39.

[55] Stickgold, *supra* note 12, at 298 (noting that these terms have been used

house clinics and externships in that simulation courses do not employ real cases.[56] In-house clinics can be distinguished from field placement programs by the virtue of law school faculty providing the supervision of the students and the cases, as opposed to field placement programs where attorneys outside of the law school provide this supervision. This distinction has been described using the terminology of "case supervised" programs to designate in-house clinics and "practice supervised" programs to designate field placement programs.[57] This distinction is adopted in this article and applied to the results of the survey. Thus, even if a program was self-described as a "prosecution clinic," if the answers showed that the students were placed in prosecutor offices and supervised by prosecutors, as opposed to by law school faculty, those results were counted as prosecution externship programs.[58]

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both by the Council on Legal Education for Professional Responsibility (CLEPR) and the 1980 Report of the Association of American Law Schools—American Bar Association Committee on Guidelines for Clinical Legal Education, Clinical Legal Education (1980)); *see also* Knight, *supra* note 19, at 849 (listing in-house clinics, externship placement clinics, and simulation clinics as the three different types of clinical programs).

[56] Marjorie Anne McDiarmid, *What's Going On Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y. L. SCH. L. REV. 239, 241 n.11 (1990) (noting the three distinct teaching methodologies comprising clinical teaching: live-client clinics using law-faculty supervised work by students, simulation courses relying entirely upon simulation, "and externships where supervision is provided by attorneys not employed by the school."). *Id.* Note, however, also the existence of what has been called "hybrid in-house/externship programs" wherein "a law school creates a partnership with a legal provider, such as a civil legal services office or public defender office, and the students enrolled in the clinic are supervised by both a full-time clinician and lawyers from the outside office." Barry et al., *supra* note 1, at 28. Finally, schools can also offer "clinical labs" where a clinical lab component is added to a traditional substantive law school course. *Id.*

[57] Maher, *supra* note 23, at 538-39. Maher uses "practice supervised" to "describe a program where students are placed off-campus in community law offices to practice law under supervision as court certified interns, and supervision of case work is provided exclusively by lawyers at the law offices." *Id.* The involvement of the law faculty under this definition is limited to placing and monitoring the students. If any supervision of the case work is done by law school faculty, Maher uses the term "case supervised." *Id.*

[58] Question number twenty-two asked how the students were supervised at the prosecutor offices, and gave full-time faculty, adjunct faculty, regular prose-

Conversely, the survey results which indicated "true" prosecution in-house clinics, i.e. where law school faculty provided the supervision of the students and their handling of the cases, were excluded from the analysis and calculation of the answers as a whole.[59] Again, however, the information provided by these schools, equally informative and pertinent to clinical legal education in general, is included in the survey data available on-line.[60]

Within the field placement category, programs are alternatively called externship or internship programs.[61] No discernable difference exists between these two designations.[62] Indeed, a recent attempt to provide formal definition in this

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cutor, and other as possible answers. The answers provided to this question were used to classify a program as an externship or an in-house clinic program. If the students were supervised by regular prosecutors, whether an adjunct professor or not, the program would be termed an externship; if full time faculty did the supervision, the program was termed an in-house clinical program. This distinction was admittedly not perfect, and at times programs could not be neatly squeezed into one classification or another. See, for example, school number seven wherein the elected prosecutor teaching as an adjunct with tenure status [sic], taught the classroom component and provided the supervision at the prosecutor office. *See* answers to questions twenty-two, twenty-three and thirty-one by school seven, SURVEY RESPONSE DATA, *supra* note 39; *see also* discussion *supra* p. 1307-08, and note 43 noting similar classification by 1978-1979 survey by Council on Legal Education for Professional Responsibility.

[59] *See* discussion *supra* pp. 1306-08.

[60] *See* SURVEY RESPONSE DATA, *supra* note 39; *see also* p. 1310.

[61] *See* Joy, *supra* note 18, at 681 n.1 (noting the terms "externship" and "field placement" are used interchangeably).

[62] It has been stated that "[t]he naming of externship programs varies from the obscure to the scatological." Daniel Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 5, n.14 (1995) (noting that such programs "are variously called field-placement clinics, farm-out clinics, practice-supervised programs, out-of-house clinics, and even outhouse clinics"). Interestingly, despite the authors then choosing to use the term externship "because it is the term most widely used in clinical literature," as if to emphasize the academy's schizophrenia with regard to this terminology, the authors still titled their article a study of legal *internships*. *Id.* at 1 (emphasis added). Despite the term externship being the most commonly used, an etymological argument can be made that internship is the most proper term. One dictionary defines intern as "a student or trainee who works, sometimes without pay, at a trade or occupation in order to gain work experience," while defining extern as "a person working in but not living in an institution, such as a nonresident doctor or other worker in a hospital." THE NEW OXFORD AMERICAN DICTIONARY 601, 886 (2001).

area noted their interchangeability, defining an externship program as "[t]he program of study in which a law student earns academic credit for engaging in authentic lawyering tasks under the guidance and supervision of an experienced supervisor in an institution outside of the law school. *Also called an Internship.*"[63]

General School Information

Externship programs are presumably feasible in schools of all sizes and locations, as well as those offering traditional day programs and those offering evening or part-time programs. In fact, for law students enrolled in evening programs, externships may be the only feasible means of participating in a clinical program.[64] With this in mind, the first part of the survey sought to ascertain some general information about schools which do have prosecution externship programs.

School Size, Part-Time Programs

Out of the seventy-one responding schools, twenty-one (30%) fell in the under 500 category, thirty-five (49%) in the 500-1,000 category, and thirteen (18%) in the 1,000 category.[65] Thirty-six (51%) of the responding schools had part-time programs, while thirty-four (48%) did not.[66] Out of the thirty-six schools which indicated they had a part time program, the vast majority—thirty-two, permitted their part-time students to participate in their prosecution externship programs.[67] Put

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[63] Ogilvy, *supra* note 32, at 179 (emphasis added).

[64] Part-time students may have a limited opportunity to participate in prosecution externship programs as well. *See* question three, school six, SURVEY RESPONSE DATA, *supra* note 39 (noting that "there was only one night court opportunity").

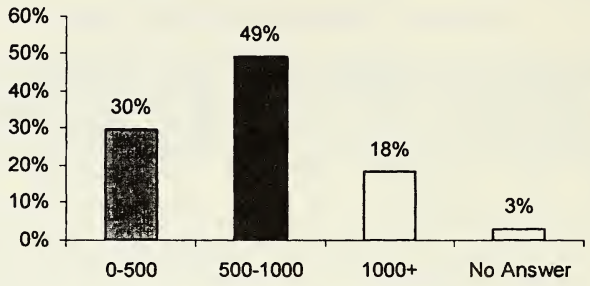
[65] *See* question one, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart One. Two schools, numbers one and twenty-two, did not provide answers to this question. Note that the size categories are identical to the categories used by Seibel and Morton in their survey of externship programs as a whole. *See* Seibel & Morton, *supra* note 13, at 427.

[66] *See* question two, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Two. One school did not provide an answer.

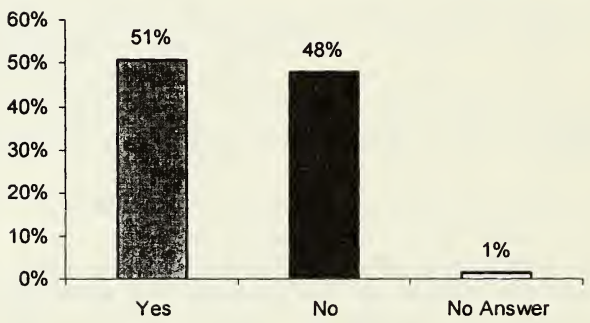
[67] *See* questions two and three, SURVEY RESPONSE DATA, *supra* note 39.

another way, out of the thirty-six schools with part-time programs, 89% permitted their part-time students to participate in their prosecution externship programs.[68]

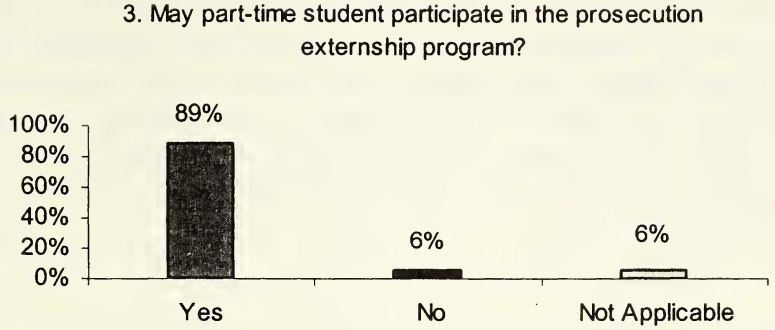
1. How large is your lawschool?



2. Does your school have a part-time program?



[68] *Id.*; *see also* Chart Three.



CLINICAL OFFERINGS AND STUDENT PARTICIPATION

The number of clinical programs, including prosecution externships, offered ranged from two to twenty.[69] This information was somewhat unclear in that it appears some schools included the number of externship placements as opposed to programs, i.e., counting each placement as one program.[70] The data, however, does support a trend of schools providing a

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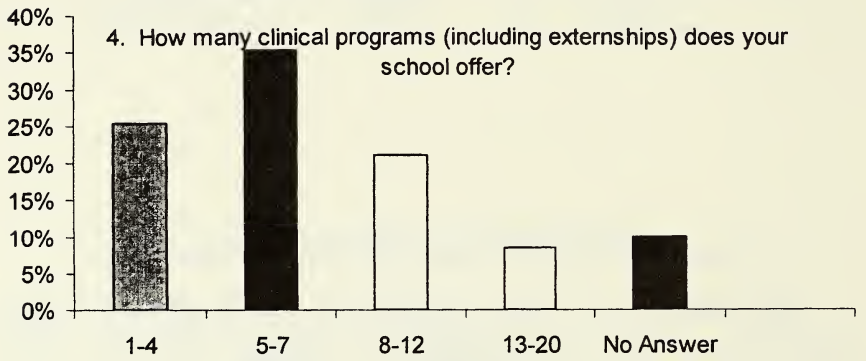
[69] *See* question four, SURVEY RESPONSE DATA, *supra* note 39. Note that school twenty-six indicated two programs and forty externship placements. Although unclear if this meant two or three programs, it was counted in the "2" programs offered category, the assumption being that the number forty pertained to extern placements, not clinical programs.

[70] *See, e.g.,* responses by schools number twenty and twenty-six to question four—"How many clinical programs (including externships) does your school offer?" School twenty responded—Twenty (approximately)" while school twenty-two responded—"Two (forty externship sites, one tax clinic)." School twenty was counted as twenty programs, while school twenty-six was counted as two programs. *Id.*

large and varied selection of programs. Five to seven clinical offerings emerged as the most popular, with twenty-five schools (35%) falling in this category, followed by eighteen schools (25%) offering one through four programs. Fifteen (21%) offered between eight and twelve, while six indicated between thirteen and twenty.[71] Seven schools did not provide an answer to this question.[72] As a historical comparison, the MacCrate Report noted that in 1987, there was an average of 2.1 clinics per school.[73] With regard to externship programs, the report relied upon 1990 numbers, and noted that such programs were "holding steady at approximately an average of 3 per school."[74]



[71] *See* question 4, SURVEY RESPONSE DATA, *supra* note 39.

[72] *Id.*; *see also* Chart Four.

[73] MacCrate Report, *supra* note 13, at 239. Calculations were based upon seventy reporting schools, i.e. an almost identical sample as the current survey which used seventy-one reporting schools. *Id.*

[74] *Id.* The MacCrate Report did not indicate the number of schools reporting, but noted that the figures were derived by "[c]omparing the American Bar Association Curriculum study data to those of the Task Force survey . . ." MacCrate Report, *supra* note 13, at 239. The curriculum study referenced was presumably Williams Powers, Office of the Consultant on Legal Education to the ABA, *A Study of Contemporary Law School Curriculum, (1986)* and *A Study of Contemporary Law School Curricula II (1987). Id.* at 242. The Task Force survey reference was presumably MacCrate Report, *Survey on Professional Skills Instruction (April 1990). Id.* at 397.

If offering a large amount of clinical programs could be viewed as a trend, requiring students to participate in such programs was not. Question number five addressed this issue head on. Only three of all responding schools (4%) required participation in clinical programs for all students.[75] While law schools today are not mandated to provide clinical opportunities to all their students,[76] nor to accommodate every student who wishes to enroll in a particular professional skills course,[77] considering the continuous and historical emphasis on the need for improvement of professional skills on the part of American law students,[78] it is confounding that not more schools see fit to require their students to graduate with such skills. Possibly, if not hopefully, the minority of schools that do require participation in clinical training today will at some point in the future be viewed as having been trailblazers.[79]

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[75] *See* question five, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Five. It needs to be noted here that the survey did not seek information about other forms of skills training such as simulation or moot court.

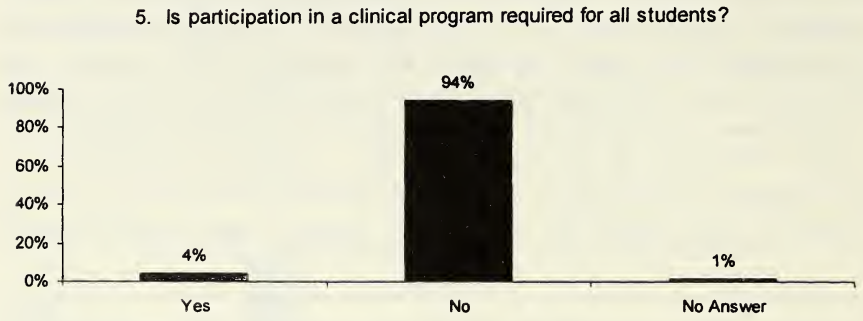
[76] *See* ABA INTERPRETATION 302-5, *supra* note 9. ("A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client clinic or other real-life practice experience.")

[77] *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 302-4 (2005), *available at* http://www.abanet.org/legal/standards/chapter3.html. ("A law school need not accommodate every student requesting enrollment in a particular professional skills course.")

[78] See, for example, Rowe, *supra* note 5, for early Twentieth century call (1917) for clinical training, and Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227 (1973) for a late Twentieth Century call for better skills training. Possibly most influential in the more recent calls for improved professional skills was the MacCrate Report and its emphasis upon ten "Fundamental Lawyering Skills" (to wit: Problem Solving, Legal Analysis and Reasoning, Legal Research, Factual Investigation, Communication, Counseling, Negotiation, Litigation and Alternative Dispute-Resolution Procedures, Organization and Management of Legal Work, and Recognizing and Resolving Ethical Dilemmas), as well as its four "Fundamental Values of the Profession," (to wit: Provision of Competent Representation, Striving to Promote Justice, Fairness, and Morality, Striving to Improve the Profession, and Professional Self-Development). MacCrate Report, *supra* note 13, at 138-41.

[79] Other factors, particularly cost, could play a part in schools not mandating clinical participation. The MacCrate Report, for example, estimated that it would

As of now, however, the law school academy as a whole has voted with their feet, and the path is not encouraging.



If unanimity exists across the academy in not requiring students to participate in clinical programs as a whole, a similar (but not as strong) unanimity exists as to who may participate in clinical programs. Fifty-three schools (75%) permitted second and third year students to participate in clinical programs. Nine schools (13%) limited participation to third year students,[80] while two schools (3%) permitted all students

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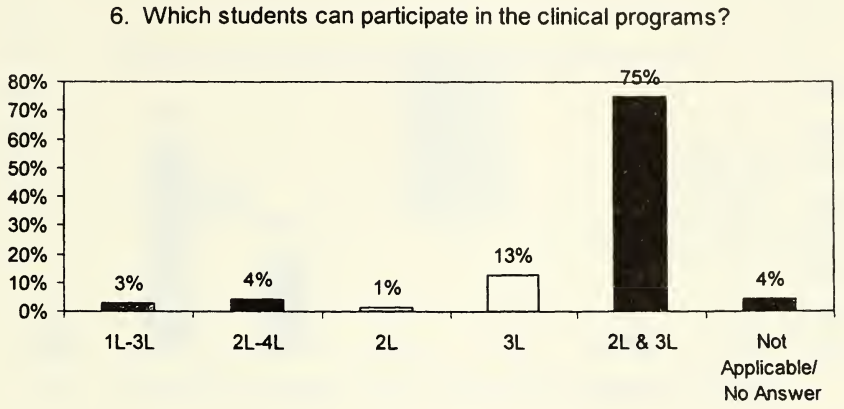
cost the academy an additional $170.4 million to provide live client clinics to the 28,500 students who as of the 1987-88 academic year were not enrolled in clinical programs. MacCrate Report, *supra* note 13, at 254 n.36. As Dean John Kramer subsequently noted, the true numbers in this "infamous" footnote should have been $225-250 million. The lower number was selected out of fear the higher number "would be used to beat us [clinicians] on the head in faculty meetings, ridiculing an almost twenty-five percent increase in the outlays for legal education nationwide." John R. Kramer, *Extra-Curricular Programs, in* THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM 74, 77-78 (Joan S. Howland et al. eds., 1993).

[80] *See* question six, SURVEY RESPONSE DATA, *supra* note 39.

(first year through third year) to participate.[81] Similarly, three schools (4%), all larger schools (500-1,000 students range) and all with part-time programs, permitted second years, third years and fourth years to participate in their clinical programs.[82]



Interestingly, the numbers were a little more restrictive when the question specifically addressed which students could participate in the prosecution externship programs. While fifty-three (75%) of all the schools permitted second and third year students to participate in their clinical programs as a whole,[83] the number decreased to forty-two (59%) when the

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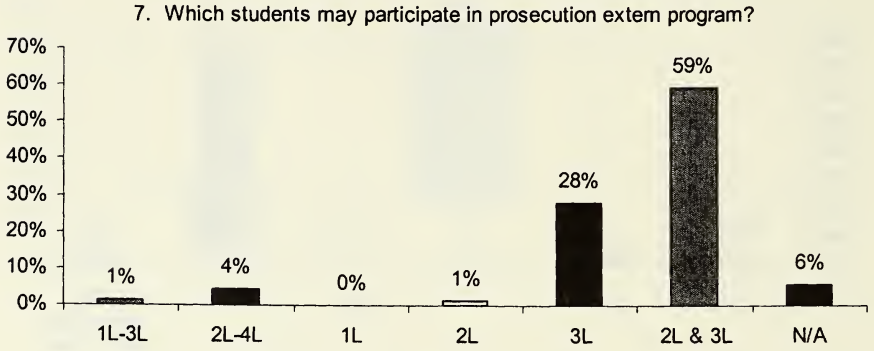
[81] *Id.*; *see also* Chart Six. Schools forty-one and forty-eight. No explanation as to the extent of participation by first year students was provided. Presumably first year students would not fulfill most jurisdictions' limited practice requirements.

[82] *Id.* Schools eleven, fifty-two, and sixty-nine. It is presumed that these schools referred to part-time students taking longer than the traditional three years to complete their law studies as "4L" students.

[83] *See supra* note 80.

question asked which students could participate in their prosecution externship program.[84] Correspondingly, the number of schools which required prosecution externs to be third year students, increased from nine (13%) to twenty (28%).[85]



Twelve (17%) schools indicated they offered both a prosecution externship and a prosecution clinic, while fifty-six (79%) noted that they did not.[86] Fifty-eight schools (82%) indicated they offered a criminal defense externship or clinic as well as a prosecution externship, while ten (14%) did not.[87]

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[84] *See* questions six and seven, SURVEY RESPONSE DATA, *supra* note 39.

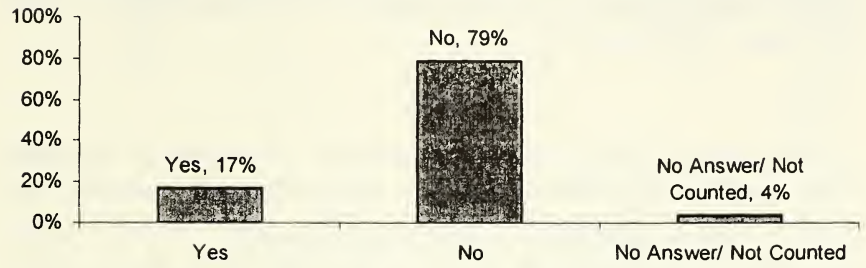
[85] *Id.*; *see also* Chart Seven. Interestingly, one school (forty-one) indicated first year through third year students could participate in their prosecution externship program. No explanation was provided as to the parameters of first year students participating in an externship placement. Presumably 1L students would not qualify as limited practice students in most jurisdictions.

[86] *See* question eight, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Eight.

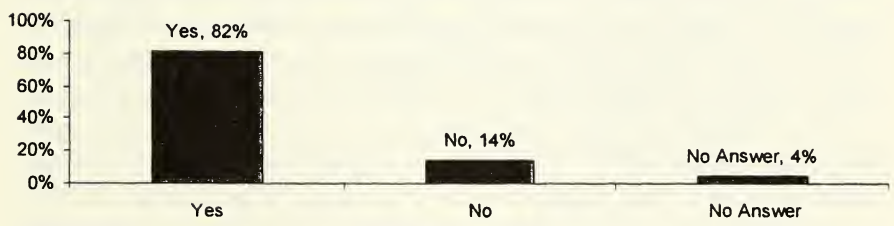
[87] *See* question nine, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Nine.

Finally, the vast majority of schools primarily placed their students in urban areas (forty-eight schools or 68%), or in both an urban and rural setting (twenty-two schools or 31%).[88]

8. Does your school offer both a prosecution externship and a prosecution clinc?



9. Does your school offer a criminal defense externship or clinic as well?



EXTERNSHIP PROGRAMS

The information solicited through questions one to ten (discussed above) pertained to the schools and their clinical programs in general. The second set of questions (eleven through thirty-two) sought information specifically pertaining

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[88] *See* question ten, SURVEY RESPONSE DATA, *supra* note 39. Note that one school qualified the urban categorization with "small," (school nine), while one school qualified the both category with "mainly rural" (school fifteen).

to prosecution externship programs. As noted above, the majority of schools incorporate their prosecution placements in their general externship program. Nevertheless, the information provided in this section enables one to draw conclusions as to trends and general parameters of prosecution programs across the country. In other words, the fact that the information may be applicable to other types of externship placements as well, does not diminish its applicability to prosecution externship programs. In that respect, the information is both pertinent and valuable.

SIZE

The size of the prosecution externship programs in terms of the number of students which could participate ranged from small to large. Twenty-five schools (35%) indicated zero to ten students while twenty-six schools (37%) indicated ten to twenty students.[89] Five schools (7%) each fell into the twenty to thirty and the thirty to forty categories, while seven schools (10%) fell in the forty plus category.[90] The question, unfortunately, did not specify semester or year. However, many schools added such specifications, permitting those schools to be placed with certainty in appropriate categories.[91] The answers to this question should most accurately be read to reflect the number of students enrolled in each school's program for the length of such program, i.e. some are one semester program while others are full year programs. These numbers correspond proportionally to the data found by Seibel & Morton. That survey found that in 1992-1993, 39% of externship programs had zero to ten students, 33% had eleven to twenty students, 19% had twenty-one to forty students, and 10% had forty or more students.[92]

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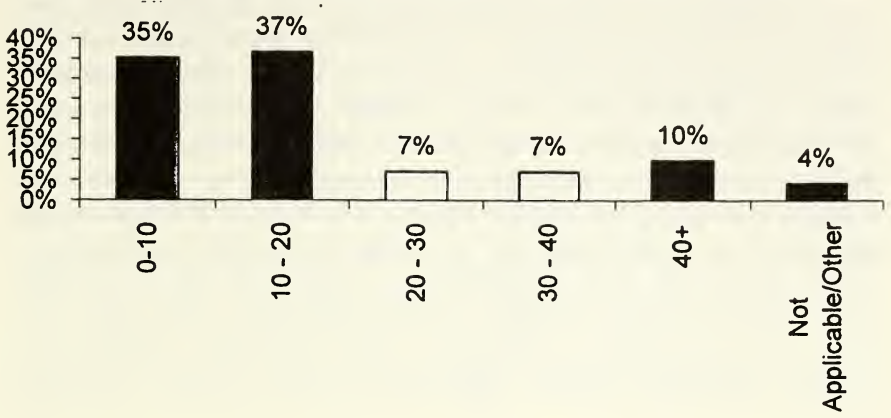
[89] *See* question eleven, SURVEY RESPONSE DATA, *supra* note 39.

[90] *Id.*; *see also* Chart Eleven.

[91] See question seven, SURVEY RESPONSE DATA, *supra* note 39, for school specifications as to semester or year. Out of the schools which did specify, seven indicated semester and seven indicated year. *Id.*

[92] Seibel & Morton, *supra* note 13, at 424 (rounding up to the nearest percentage).

11. How many students participate in your prosecution externship program?



STUDENT SELECTION PROCESS

Regardless of the number of students enrolled in a program, how to select those students is always a delicate process. Other than setting certain academic pre-requisites,[93] the decision has to be made whether a student can simply enroll in a clinical program through regular registration as he or she would for any other law school class, or whether the student should be subject to a screening process. Implicit in a screening process is that the clinical faculty, or the placement attorneys, has a say, if not a veto, in who will be permitted to enroll in the clinical program. Although wholly un-democratic, the clinical faculty arguably has a duty to ensure that only students of sufficient interest, maturity and character are permitted to participate as student-attorneys in the high publicity and pressure inherent in any clinical setting, including prosecution externship placements. The concern with such an argument is that any decision as to personnel, which this in essence is, if based upon subjective criteria, has the danger of becoming clinical faculty selecting "those students whom the faculty member most wants to teach."[94] The unfairness in

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[93] *See* discussion pertaining to pre-requisites, *infra* p. 1326.

[94] David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bel-*

such a process speaks for itself[95] and should not be permitted.[96]

It was with this dilemma in mind that question eighteen asked how students were selected to participate in the externship programs. Since the question asked for a narrative answer, the answers are not clearly classifiable. However, three general categories can be extrapolated from the various answers: one group termed regular registration wherein any student can simply register and enroll for the externship, one wherein an application process and implicitly a subsequent approval by the clinical faculty was required, and one where the students applied directly to the placement. The split was fairly even among the programs which permitted students to register through regular registration (26 or 32%) and those

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low and Moulton, 10 CLINICAL L. REV. 245, 267 (2003). It may be fitting that it was in the area of prosecution that the Supreme Court warned that too much discretion without standards may lend itself to arbitrary actions, stating that "[w]here, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (striking down City of Jacksonville vagrancy ordinance).

[95] One of the author's most vivid memories from clinical teaching involves a student who had not been selected for enrollment in the Tulane Law School Criminal Defense Clinic who confronted the author in a classroom one year later, and, sobbing, accused the author of having ruined her life through that decision. Although the somewhat overly dramatic and immature way the student handled adversity may have indeed proved that the decision was actually correct, in retrospect the author was still left with the painful conclusion that there really were no objective grounds with which to justify the decision not to select her for participation in the clinic. The decision was strictly a subjective one, albeit based upon grades, an essay and worst of all, a personal interview.

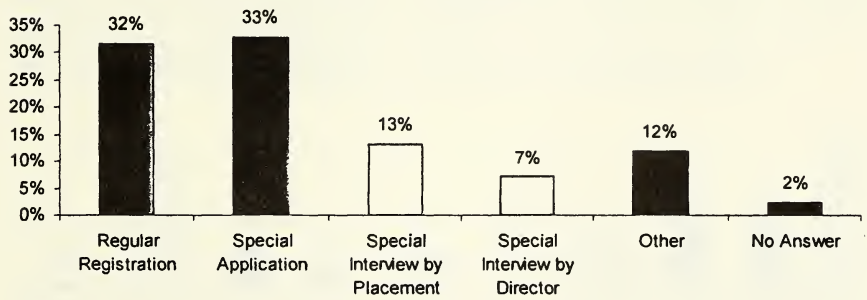
[96] One commentator noted:

> A model that selects the most political and/or most talented clinic applicants cannot be tolerated in law schools, especially in an environment in which not every student who wants to take clinic can enroll. Since we should be able to motivate every student to provide competent representation, resources should then be focused on the students who most need clinical education and who would most benefit from exposure to our methodology. If we do not want to invest the time and resources that would be required to identify each such student, we must opt for a randomized selection process that gives every student an equal chance for selection.

Chavkin, *supra* note 94, at 267.

programs which required a special application process (27 or 33%).[97] Six programs (7%) required a face to face interview with the clinical faculty, arguably the most subjective method upon which to base this decision. A slightly larger number (11 or 13%) transferred the selection process, including an interview (6 or 7%), to the field placement.[98] Considering the perception of unfairness which may accompany any negative decision based upon something as subjective as a personal interview, and the lack of uniformity in how this process is handled at different schools, it may be an area in need of development of guidelines and scholarly justifications for either side.

18. How are students selected to participate in the externship program?



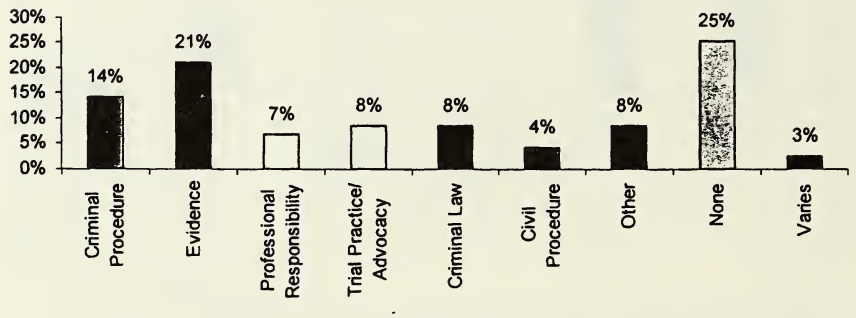
[97] *See* question eighteen, SURVEY RESPONSE DATA, *supra* note 39. Note that the percentages here are calculated on eighty-two responses since several schools fell into more than one category. Schools three, five and twenty-eight, for example, all indicated special application and a director interview. Seven schools indicated a lottery was used for selecting students. These schools were included in the "regular registration" category since such a lottery process lacks the subjectivity inherent with special applications and/or interviews.

[98] *Id.*; *see also* Chart Eighteen.

PRE- OR CO- REQUISITES

Related to both which students may participate in prosecution externship programs and how those students are selected, is the issue of what pre- or co-requisites various schools require for such participation. Question sixteen sought to elicit this information. If there was a discernable trend across the country in this respect, it was that twenty-five schools (21%) required students enrolling in their prosecution externship programs to either be enrolled in or previously have taken Evidence.[99] Interestingly, except for no requirement (thirty schools, 25%), there was no other discernable trend as far as pre- or co-requisites. Seventeen schools (14%) required criminal procedure, ten schools (8%) required trial practice/advocacy, while ten schools (8%) also required criminal law.[100] Only eight schools (7%) required professional responsibility.[101]

16. What prerequisites or co-requisites do you have for the externship?



[99] *See* question sixteen, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Sixteen.

[100] *Id.* Note that respondents were free to provide more than one category. As such there were a total of 118 different responses in the nine categories graphed in Chart Sixteen. The percentages are based upon this number as opposed to the seventy-one responding schools.

[101] *Id.*

If there was a surprise in this particular data, it would arguably be the relatively small number of schools which required their prosecutorial externs to take or have taken professional responsibility. This is surprising for two reasons. First, the literature pertaining to field placement programs in general, and prosecution externship programs in particular, is replete with scholarship emphasizing the importance of ethics and professionalism.[102] Second, sixty-five (87%) of the schools responding to the survey indicated that they cover ethics and professionalism as part of their prosecution externship program in one form or another.[103] The vast majority of these responses indicated in narrative form that they did so through their classroom component.[104] Clearly, the clinical faculty across academia is in agreement as to the importance of exposing prosecutorial externs to ethics and professionalism concepts. However, the absence of professional responsibility as a pre- or co-requisite may also be evidence of an equal agreement that the general professional concepts covered in such courses are not sufficiently specific for students externing in a real life criminal setting.

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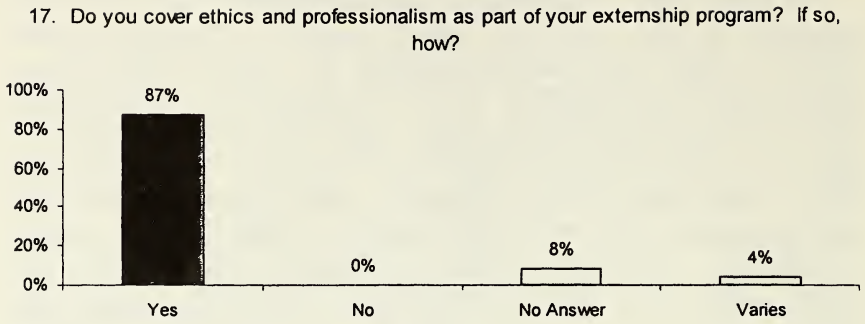
[102] *See, e.g.*, J.P. OGILVY ET AL., LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS (1998) (devoting one entire chapter to ethical issues); Kate E. Bloch, *Subjunctive Lawyering and Other Clinical Extern Paradigms*, 3 CLINICAL L. REV. 259 (1998) (discussing the role of the clinical teacher in facilitating resolution of ethical issue which may arise in externship placements, and significantly, choosing to employ prosecutorial settings for such scenarios); Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships; Fostering Commitment to Public Service*, 67 FORDHAM L. REV. 2295 (1999) (discussing ethical scenarios typically encountered by externs, including prosecution externs); Robert J. Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 65-67 (1986) (extending discussion from ethics to how externship setting is beneficial to aiding in students a "moral understanding" as to professional issues); *see also*, Caplow, *supra* note 28, at 10 (noting the unique professional responsibilities which accompany a prosecutor's quasi-judicial role).

[103] *See* question seventeen, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Seventeen.

[104] *Id.* (*see* narrative responses).



TYPES OF PROSECUTOR PLACEMENTS

A prosecutor externship program generally has five possible placements: United States Attorney, District Attorney, Attorney General, County Attorney, or City/Municipal Attorney. Question number twelve sought to ascertain what type of placements were the most popular across the country. It did so by asking what type of prosecutor offices students were placed in as prosecutorial externs.[105] If placed in several offices, as most programs did, the respondents were asked to provide an estimated percentage of placement locations.[106]

The most popular prosecutor placement was district attorneys, closely followed by United States Attorneys. Fifty-four schools (26%) indicated they placed their prosecutorial externs with district attorney offices, while fifty-two schools (25%) indicated federal prosecutors.[107] The remaining prosecutorial placements were equally split among city prosecutors (thirty-six or 18%), county prosecutors (thirty-two or 16%) and attorney generals (thirty or 15%).[108] A follow-up question to the

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[105] *See* question twelve, SURVEY, Appendix A.

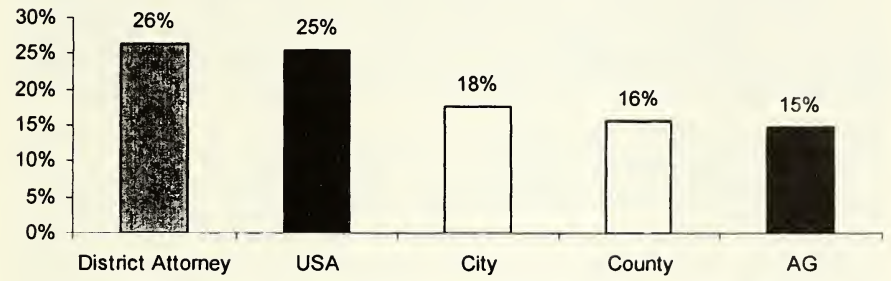
[106] *Id.*

[107] *See* question twelve, SURVEY RESPONSE DATA, *supra* note 39.

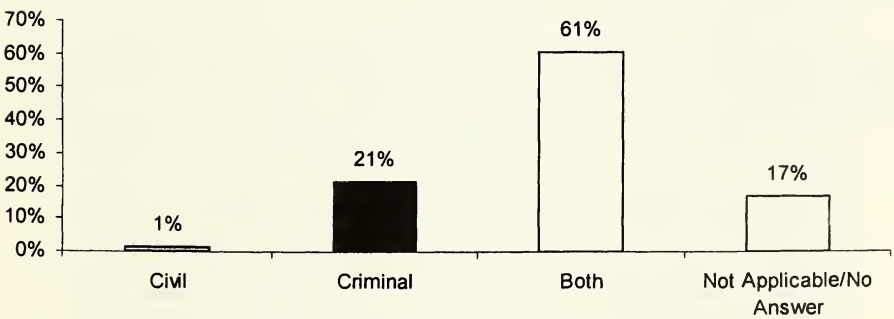
[108] *Id.*; *see also* Chart Twelve. Note that the numbers in chart twelve exceeds seventy-one, i.e. most schools placed students in several types of prosecutor offices. The percentage values in parenthesis are thus based upon the total number of prosecutor office placements (204), which was derived at by simply totaling all instances when a school indicated they placed a student at a particular office. The respondent's estimations as to what approximate percentage of placement corre-

schools which placed their students with United States Attorneys offices, or Attorney General offices, both prosecutor offices where there are normally separate divisions handling criminal and civil matters, inquired as to which of these divisions the students worked in. Fifteen schools (21%) indicated their students only did criminal matters, while the majority (forty-three schools or 61%) had their students handle both criminal and civil matters.[109]

12. What type of offices do you place students in? If several, please indicate average approximate percentage of placement.



13. If you place students in USA or AG, do the students work in both the criminal and civil divisions?



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sponded to each office can be seen in the tabulation of answers to question twelve. *See supra* note 107.

[109] *See* question thirteen, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Thirteen.

Credit Hours and On-site Hours

The type of prosecutorial office in which students are placed is peculiar to prosecution externship placements. Questions fourteen and fifteen, however, addressed an issue which cuts to the core of all field placement programs—how many credit hours are awarded for such placements, and how many on-site hours, i.e. the hours the student "works" at his or her placement, do such credit hours equal? This appears to be an area where the ABA Standards have had a unifying effect upon externship programs across the land.

In 1993, the ABA amended Interpretation 2 of Standard 306(c),[110] adding language ensuring that "the level of scrutiny and the requirements for externship programs increased significantly as the academic credits awarded increased."[111] Per the amended language of Interpretation 2 of Standard 306, field placement programs awarding six or more credit hours had additional criteria made applicable to them, including a classroom component, a written appraisal of the program every three years and required on-site visits by full-time faculty.[112] Although Interpretation 2 of Standard 306 became In-

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[110] Standard 306 was renumbered Standard 305 in February and August of 1996. *See* Joy, *supra* note 18, at 702.

[111] *Id.* at 698.

[112] *Id.* at 698-99. Subsection (h) of the 1993 Version of AMERICAN BAR ASSOCIATION INTERPRETATION 2 OF ACCREDITATION STANDARD 306: Regarding Field Placement Programs, *reproduced in* Joy, *supra* note 18, at 718-19, reads in its entirety:

> (h) In those field placement programs that award academic credit in excess of six credit hours per semester, the following additional criteria apply:(1) A classroom component is required. If the classroom component is not contemporaneous, the school has the burden of demonstrating that its alternative is a functionally and educationally equivalent classroom experience involving full-time faculty. The alternative may be a meaningful pre- or post-field placement experience involving full-time faculty. The classroom component may be satisfied by regular tutorials conducted by the full-time faculty.(2) A written appraisal of each program shall be conducted at least every three years by the law school to evaluate whether the program is meeting its stated educational objectives.(3) The school shall ensure that there is careful and persistent full-time faculty monitoring of the academic achievement of each student. This shall include an on-site visit in each field placement by full-time faculty in the

terpretation 305-2 as Standard 306 was renumbered Standard 305 in 1996,[113] the substance of the interpretation remained unchanged.[114] This remained true three years later as much of what had appeared in Interpretation 2 of Standard 306 became part of the text of Standard 305 in 1999.[115] As per the 1999 version of Standard 305, periodic on-site visits by a faculty member were preferred for all field placement programs, but required if more than six credit hours were awarded.[116] Similarly, while a classroom or tutorial component was preferred for all field placement programs, if six or more credit hours were offered, the classroom or tutorial component was required.[117] Six credit hours remained the threshold level as the pertinent language moved from 305(f) into 305(e) in August of 2004,[118] until 2005 when the language of subsections

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course of the field placements. The school shall document this monitoring. February, 1993.

Id.

[113] Joy, *supra* note 18, at 702.

[114] *Id.*

[115] *Id.* at 703.

[116] AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(f)(3) (1999). Subsection (f)(3), *reproduced in* Joy, *supra* note 18, at 703, reads in its entirety:

> (3) Periodic on-site visits by a faculty member are preferred. If the field placement program awards academic credit of more than six credit hours per academic term, an on-site visit by a faculty member is required each academic term the program is offered.

[117] AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(f)(4) (1999). Subsection (f)(4), *reproduced in* Joy, *supra* note 18, at 703, reads in its entirety:

> (4) A contemporaneous classroom component or tutorial component taught by a faculty member is preferred. If the field placement program awards academic credit of more than six credits per semester, the classroom or tutorial component taught be a faculty member is required; if the classroom or tutorial component is not contemporaneous, the law school shall demonstrate the educational adequacy of its alternative (which could be a pre- or post-field placement classroom component or tutorial.

Id.

[118] The new language of sub-sections (5) and (7) in 305(e) of AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305 (2004), *available at* http://www.abanet.org/legaled/standards/2004-

(e)(5) and (e)(7) were amended to lower this threshold to four credit hours. As of February 2005, the Standards require "periodic on-site visits"[119] and contemporaneous "opportunities for student reflection"[120] if more than four credit hours is offered for the field placement.[121]

2005masterandstandardsbook.pdf, became effective in August of 2004, reading:

> (e) A field placement program shall include:
> (5) on-site visits by a faculty member each academic term the program is offered if the field placement program awards more than six academic credits (or equivalent) for fieldwork in any academic term
> . . .
> (7) opportunities for student reflection on their fieldwork experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn more than six academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

see also email from Peter A. Joy, Professor of Law and Director of the Criminal Justice Clinic, Washington University School of Law, to Hans P. Sinha (March 25, 2005) (explaining evolution of ABA Standards 305(f) and 305(e)(5) and (7) from 2002-2003 through 2005) (on file with author).

[119] AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(e)(5) (2005), *available at* http://www.abanet.org/legaled/standards/Chapter3.html [hereinafter ABA STANDARD 305], reads in its entirety:

> (e) A field placement program shall include:
> (5) periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for fieldwork in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate.

Id.

[120] AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(e)(7) (2005), *available at* http://www.abanet.org/legaled/standards/Chapter3.html, reads in its entirety:

> (e) A field placement program shall include:
> (7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn four or more academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

Id.

[121] The current version of Standard 305(e) was adopted by the Council of the Section on Legal Education and Admission to the Bar in August of 2004. The ABA House of Delegates concurred in February, 2005. *See* Memorandum from John A. Sebert, Consultant on Legal Education, to Deans of ABA-Approved Law

Although the ABA's attempts to mandate standards in this area have been criticized as a "micro-management approach to externships,"[122] the attention focused on the amount of credit hours by the Standards does seem to have had an effect as to how many credit hours field placement programs, including prosecution externship programs, offer their students. Since six credit hours became the threshold wherein programs awarding more would incur special attention, field placement programs as a whole have limited their programs to six or below. In fact, the Seibel and Morton survey found that in 1992-1993, "the overwhelming majority of programs—eighty-two out of ninety-eight—. . . [had] . . . a maximum credit allocation of six units or less."[123] Seibel & Morton noted that only five programs had "minimum credits of seven or higher."[124] The Stickgold & Schechter survey, conducted in the fall of 1995, had a similar yet also surprising result in this regard. While that survey found that "44 schools allowed a total of 6 or fewer total credits," it also found that thirty-seven schools allowed between seven and twelve credits, and twenty-four schools allowed over twelve credits.[125] The high number of schools which permitted an excess of six credit hours as per the Stickgold & Schechter survey is surprising in

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Schools et al. (February 17, 2005) (on file with author).

[122] Seibel & Morton, *supra* note 13, at 416, questioning whether "greater specificity in the regulation of the content and methodology of field placement programs—the heart of the 1993 revisions of Standard 306(c)'s Interpretation 2—[is] helpful to individual program goals?" See Joy, *supra* note 18, at 717, Appendix A, for "1993 Version of ABA Interpretation 2 of Accreditation Standard 306: Regarding Field Placement Programs." Seibel and Morton acknowledged that "[t]he ABA can and should play an important role in encouraging and requiring law schools to include in the curriculum valuable experiential educational opportunities, like clinics and field placement programs." Seibel & Morton, *supra* note 13, at 417. However, they maintained that the way to do so is "not to impose detailed requirements governing the elements of field placement programs," but instead to ensure that such programs, "like all others in the curriculum, have adequate supervision by faculty members who are given the time and resources to structure their programs in ways that fit with the constraints and opportunities in their particular schools and geographical locations." *Id.*

[123] Seibel & Morton, *supra* note 13, at 426.

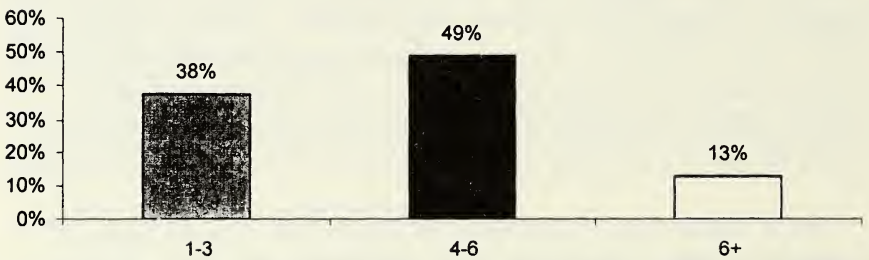
[124] *Id.*

[125] Stickgold & Schechter, *supra* note 14, at 20.

two ways. First, the six credit threshold language of section (h) of Interpretation 2 of Standard 306 (1993) had been in effect for two years when the survey was conducted.[126] Second, if anything, one would have expected a decrease of programs offering more than six credit hours between the 1992 Seibel & Morton survey and the 1995 Stickgold & Schechter survey.

Regardless of the reasons for the finding in 1995, by 2002-2003, the effect of the six credit hour language had set in.[127] Only nine programs (13%) awarded more than six credit hours as part of their prosecution externship programs. Twenty-seven (38%) awarded between one and three credit hours, while thirty-five programs (49%), awarded between four and six credit hours.[128]

14. How many credit hours can a student earn for particpating in the externship program?



[126] *See supra* notes 112 and 113.

[127] Regardless of whether this was the intended effect of the Standard or not, Carl Monk, Executive Director of the American Association of Law Schools, has noted that "[t]he key to a healthy accreditation process is balancing the need to enforce minimum standards of excellence with the need to avoid adoption of standards that inhibit creativity and innovation in legal education." William Wesley Patton, *Creating an Externship Consortium: The Glace Experience*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 233, 240 (2001) (citing to Carl Monk, The AALS Role as an Accrediting Body, THE NEWSLETTER: A Quarterly Publication of the Association of American Law Schools, Number 92-3, April 1993, at 4). Put another way, "...let a thousand flowers bloom . . . [but] . . . also see to it that the flowers are well tended." Robert J. Condlin, *Learning from Colleagues: A Case Study in the Relationship Between 'Academic' and 'Ecological' Clinical Legal Education,* 3 CLINICAL L. REV. 337, 438 (1997).

[128] *See* question fourteen, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Fourteen.

The second component of the credit hour section of the survey inquired as to how many on-site hours a student had to work in order to earn one academic credit.[129] This too is an area which is regulated by the Standards, but not with the same specificity as the number of credit hours awarded through participation in field placement programs. Instead, section (b) of Standard 305 merely mandates that "[c]redit granted shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student."[130] Although neither the Standards nor the Interpretations provide more guidance as to how schools should ensure such "commensurate" level is maintained, it has been noted that "[c]redit for fieldwork frequently is awarded at the rate of one credit-hour for each fifty or sixty hours of time devoted to assigned tasks at the placement during the semester."[131] The Seibel and Morton survey found that almost eighty-eight percent of schools allocated between three and five fieldwork hours per week for each academic hour.[132] These figures translate to "fifty-two to eighty hours of fieldwork per semester per credit."[133] The Stickgold & Schechter survey numbers of between forty-five and sixty-five hours per semester credit, although a slightly lower range, still support the Seibel & Morton data.[134] The numbers had not changed by 2002-2003. Although calculating the numbers based upon the survey responses was, as Stickgold & Schechter noted "confusing,"[135] fifty-six on-site hours for one academic credit hour accumulated the most number of schools (eighteen).[136]

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[129] *See* question fifteen, SURVEY, Appendix A.

[130] *See* ABA STANDARD 305, *supra* note 119, at Standard 305(b).

[131] Ogilvy, *supra* note 32, at 166.

[132] Seibel & Morton, *supra* note 13, at 428.

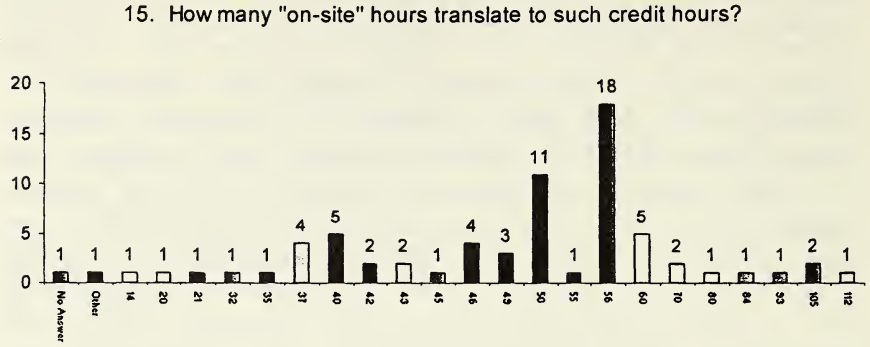
[133] Ogilvy, *supra* note 32, at 166.

[134] Stickgold & Schechter, *supra* note 14, at 20.

[135] *Id.* The responses to question fifteen were not always clear. Some responses clearly gave the number of on-site hours to one credit hour. Using an average fourteen week semester and referencing a particular school's answer to question fourteen when helpful would all be used to ascertain the school's average on-site hour per academic credit ratio.

[136] *See* question fifteen, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart

The next two largest categories were fifty on-site hours with eleven schools and sixty and forty on-site hours with five schools each.[137]



Regardless of how many credit hours a program awarded students for participation in the prosecutorial externship program, and regardless of how many on-site hours a particular school required for such credit hours, schools as a whole did not permit the inclusion of travel time in the calculation of these on-site hours. Sixty-eight schools (96%) answered in the negative when asked if they permitted the inclusion of travel time in the required on-site hours.[138] The same number of

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Fifteen.

[137] *Id.* These numbers are also supported by a 1987 survey of clinical programs as a whole, which found that "the average clinic student must work 3.88 hours per week for each clinic credit hour." McDiarmid, *supra* note 56, at 250. Using a fourteen week semester, this would work out to 54.33 on-site hours for one credit hour; *see also* Knight, *supra* note 19, at 851 (noting that the University of Nebraska in-house, faculty supervised prosecution clinic awards six credits per semester for twenty hours of work per week.) This equates to forty-six on-site hours per credit hour.

[138] *See* question twenty-eight, SURVEY RESPONSE DATA, *supra* note 39. Note that the question was designed to refer to travel between the school or home and the prosecutor's office, as opposed to between the prosecutor's office and court. It is possible that the three schools which fell in the distinct minority (4%) of permitting the inclusion of travel time in the credit hour calculation, were referring

schools answered in the negative when asked if they reimbursed students out of pocket expenses such as parking.[139]

GRADES

Regardless of the number of credit hours an extern can earn, the majority of prosecutorial externs are graded on a pass/fail basis. Fifty-five schools (77%) indicated they employed a pass/fail grading system.[140] Ten schools (14%) used a regular ABC grading scheme, while six schools (8%) used what can be termed non-traditional means of grading.[141] One of these non-traditional methods permitted the students to choose between receiving an ABC or a pass/fail grade,[142] while another assigned the externs an ABC letter grade for one credit hour and a pass/fail grade for the remaining credit

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to the latter travel time when answering the question. (One such school, number sixty-seven, interestingly indicated "partial credit.") If so, it will correlate with the author's experience that travel time between the prosecutor's office and court is not necessarily devoid of an educational benefit. In a rural area such as Mississippi where the courts still "ride the circuit," prosecutorial externs who ride along with a prosecutor, and especially judicial interns who ride with the judge, often comment upon how much they learn from discussing issues with their on-site supervisor during those drives.

[139] *See* question twenty-nine, SURVEY RESPONSE DATA, *supra* note 39. Since the Standards do not prohibit the "reimbursement of reasonable out-of-pocket expenses related to the field placement," AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 305-3 (2005), *available at* http://www.abanet.org/legaled/standards/chapter3.html [hereinafter ABA Interpretation 305-3], the response by school ten—"No, I wish I could—these expenses build up," likely reflects the thinking of most field placement faculty.

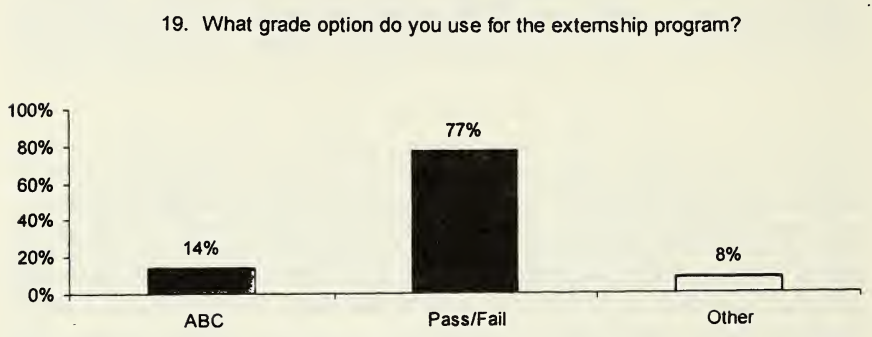
[140] *See* question nineteen, SURVEY RESPONSE DATA, *supra* note 39. The literature support these numbers. "The fieldwork portion of the course is commonly graded on a pass/fail basis, which is assessed by evaluating whether the extern completed the required number of hours of fieldwork and whether the work was satisfactorily completed." Ogilvy, *supra* note 32, at 173.

[141] See question nineteen, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Nineteen.

[142] *Id.* School 30. *See also* Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education,*, 3 CLINICAL L. REV. 299 (1997) for a discussion of the pros and cons of pass/fail and number grades in a clinical, albeit not strictly field placement, setting. After a one semester experiment in 1995 wherein students were permitted to select between pass/fail and a fully graded option, 84% of students elected grades, while only 16% elected the pass/fail option. *Id.* at 310.

hours.[143] That school assigned between three and four credit hours for participation in their prosecution externship program.[144]

Out of the fifty-two schools (72%) which also had a classroom component to their externship program, twenty-three (32%) indicated they used a pass/fail grade option for the class, while fifteen (21%) used a graded option.[145] Four fell in an "other" category.[146] Interestingly, school number thirty permitted its externship students to select between a pass/fail and a graded option for both their placement credits and for their classroom component credits.[147]



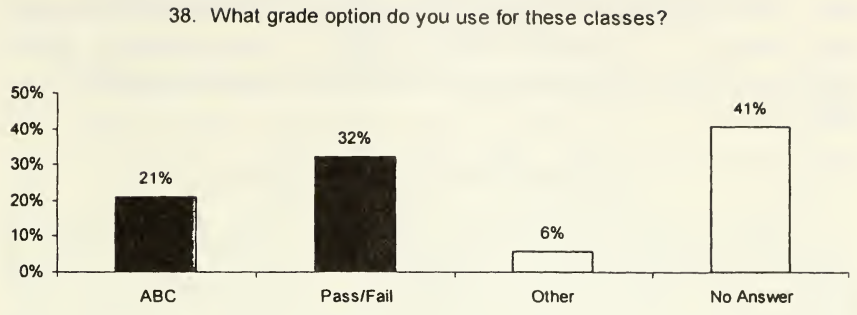
[143] *See* question nineteen, SURVEY RESPONSE DATA, *supra* note 39. School thirty-one. Interestingly, California Western School of Law as early as 1987, employed a similar non-traditional grading option in their internship program wherein the students received "a numerical grade for one unit of the course and a pass/fail grade for the remainder of their units." Janet Motley, *Self-Directed Learning and the Out-of-House Placement,* 19 N.M. L. REV. 211, 213 (1989). The graded unit was based upon the students' written assignments, journals and quality of discussions in private meetings. *Id.* By having the graded unit, the students took these assignments more seriously. *Id.*

[144] *See* question fourteen, SURVEY RESPONSE DATA, *supra* note 39. School thirty-one.

[145] *See* question thirty-eight, SURVEY RESPONSE DATA, *supra* note 39, as well as discussion on classroom component *infra* pp. 1357-60. Unfortunately, although fifty-two respondents indicated in their answers to question thirty-three that they did have a classroom component, only forty-two schools provided answers to question thirty-eight pertaining to their classroom grading option. *Id.*

[146] *Id.*; *see also* Chart Thirty-eight.

[147] *See* questions nineteen and thirty-eight, SURVEY RESPONSE DATA, *supra* note 39.



For a historical comparison, one can note that 77% of programs grading the placement component on a pass/fail basis is similar to the findings by Seibel & Morton that in the 1992-1993 academic year only thirty-two out of ninety-eight externship programs awarded letter grades.[148] In other words, Seibel & Morton found that out of their survey base of ninety-eight programs, sixty-six or 67% used the pass/fail option, a percentage remarkably similar to 77% of this survey. Going a quarter of a century back in time, one finds that the practice was to grade the clinical component pass/fail while the classroom component was universally graded with a letter or number grade. Extrapolating information from two different tables in the Council on Legal Education for Professional Responsibility's 1978-1979 survey, one finds that eighteen of the clinical programs offered by schools were prosecution externship programs.[149] Out of these eighteen programs, six

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[148] Seibel & Morton, *supra* note 13, at 434. It is presumed that by saying "award grades," the authors of the survey meant ABC grades as opposed to pass/fail grades. Presumably, some reflection must be made upon a student's transcript indicating he or she has successfully earned the academic credit in question.

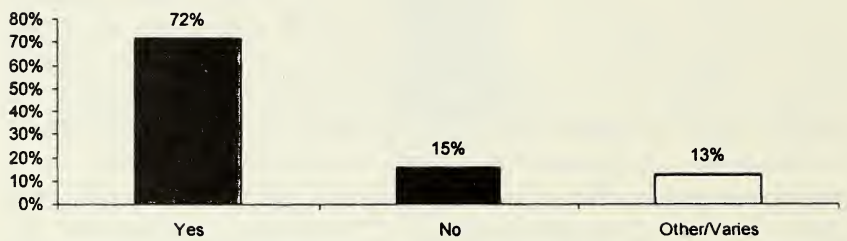
[149] SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION, supra note 43. The eighteen prosecution dedicated programs were derived by selecting only those programs which fell into the non-school operated, not at school programs, i.e., Category 3(c) [but not (b)], and Location 4(c) for location. *See supra* note 43, Table 1—"General Description of Law School Clinic Programs," at 1-20. The eighteen schools were American, Arizona State, Florida State, Fordham, Hawaii, Hofstra,

(33%) used a letter/number grading system for their clinical part, while twelve (66%) used pass/fail or credit/no credit grading system.[150] Seventeen (94%) used a letter/number grade for their class component, while only one used a pass/fail system.[151]

LIMITED PRACTICE BY STUDENTS

The survey showed, to no surprise, that the majority of students participating as prosecutorial externs at law schools across the nation were sworn in as limited practice students.[152] Question twenty probed this area. A resounding majority, fifty-one respondents (72%), indicated in the affirmative. Eleven (15%) said no, while nine (13%) fell in the other/varies category.[153]

20. Are students sworn in under a limited practice rule?



Mercer, William Mitchell, New Mexico, North Dakota, University of the Pacific, Seton Hall, Southern Methodist, Stetson, Suffolk (juvenile prosecution program), Texas, Texas Tech and William & Mary. *Id.*

[150] *Id.* at 69-78, Tbl. 4: Clinical Grading. The eighteen programs extrapolated from Table One were then cross-checked with the information pertaining to them in Table 4 in order to ascertain what type of grading practice they employed.

[151] *Id.*

[152] *See, e.g.,* David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998) (listing student practice rules).

[153] *See* question twenty, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Twenty. Out of the nine "other/varies" category schools, all but one indicated there was a possibility for the students to be sworn in. If one adds these eight programs to the other affirmative answers, the percentage of programs where the students can be sworn in increases to 83%. One of these nine answers was "unsure."

JOURNALS, TIME-LOGS, AND READING AND WRITING REQUIREMENTS

The vast majority of law students at some point in their law school career work in a legal related job.[154] Presumably, these students at the very least gain some legal experience from their clerkship positions, in addition to a salary.[155] When students are placed in prosecutor offices or any field placement position, at the very minimum there must be a moral justification for those students paying tuition to the law school for the privilege of "working" for free at a place where they possibly could otherwise work for pay.[156] In addition to

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[154] Albeit somewhat dated at this point, a study conducted in 1984 found that ninety percent of graduates of the classes of 1973, 1976, and 1979 through 1982 from the University of Utah College of Law had held a legal clerkship employment during their law school career. Donald N. Zillman & Vickie R. Gregory, *Law Student Employment and Legal Education*, 36 J. LEGAL EDUC. 390, 390-91 (1986) [hereinafter Zillman & Gregory Survey]. An overwhelming majority of students in the Zillman & Gregory survey (86%) chose "general desire to gain practical experience" as the most important reason for doing a clerkship. *Id.* at 392. There is no reason to believe today's students clerk at any lesser rate, nor that their motives differ.

[155] More than ninety percent of the students in the Zillman & Gregory survey "viewed their clerkship experience as worthwhile." *Id.* at 395.

[156] Assigning students to field placements, and accepting their tuition dollars for such a privilege, without providing an educational component to such experience, is no different than a law school accepting students' tuition and not adequately preparing them for their roles as attorneys. *See* Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89, 92 (1994) (noting that it is "difficult to understand how a law school . . . can derive 86 percent of its income from student tuition, send its graduates as a result out into practice with huge personal debt, and not be willing to assign equal priority in the law school, along with developing the law, to preparing its students to participate effectively in the legal profession."); *see also* Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow,* 8 CLINICAL L. REV. 109, 118 (2001). There is no difference to this concept when applied to externship placements. "To justify tuition charges and the award of course credit for an externship placement experience, the law school is obligated to provide value added to the student's experience at the placement. The value commonly is supplied by providing structured preparation for the placement experience and structured reflection on the placement experience through discussion, writing, reading, and guided observation." Ogilvy, *supra*, note 32, at 163; *see also* Joy, *supra* note 18, at 711.

the moral justification, there is also an obligation on the part of the law school to ensure that a field placement, whether it be in a prosecutor office, or otherwise, be educationally worthwhile and beneficial to the student.[157] Absent the school adding some educational benefit to the field placement, the field placement would in essence be no different than the apprenticeship system of old, and the student would be better off seeking a paid position.

This obligation has not gone unnoticed by the ABA. The seven sub-sections of Standard 305(e) in essence seek to ensure that field placements achieve and maintain high qualitative educational levels.[158] While the language of the Standard is not exclusively limited to faculty/student interaction, a good and productive faculty/student interaction does aid in obtaining a high educational experience for an extern. Means with which to facilitate this include "structured or unstructured academic journals, critical incidence reports or logs, reflective papers, progress reports, time records, portfolios, individual conferences, group conferences, telephone conferences, e-mail exchanges, and site visits."[159] With this in mind, question twenty of the survey sought to probe the prevalence of four of the most basic requirements of externship placements: time logs, journals and reading and writing requirements.

From an experiential point of view of seeking to have the students not only observe and do, but also to learn lessons from their experiences, keeping a journal falls within the reflective part of "The Experiential Learning Cycle."[160] Possibly reflecting consensus of the benefit of journaling, much has

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[157] *See* Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach,* 44 CLEV. ST. L. REV. 275 (1996) for an excellent overview of a model prosecution externship program (albeit one termed a "clinic,"), and noting that "[i]t is ultimately the law school's responsibility to assure that the experience has educational focus in the development of professional skills." *Id.* at 288.

[158] *See supra* note 48.

[159] Ogilvy, *supra* note 32, at 172.

[160] OGILVY ET AL., *supra* note 102, at 4. The components of the experiential learning cycle are "planning, doing, reflecting and integrating." *Id.*

been written about this requirement of externship placements as a whole.[161] As such, it came as no surprise that the majority of schools have incorporated a journaling requirement in their prosecution externship programs.[162] Indeed, out of the seventy-one programs, forty-eight schools (67%) required their students to maintain a journal, while eighteen (25%) did not.[163] The vast majority of the schools which did require their students to maintain a journal, did not require such journals to be shared with their on-site supervisors. Thirty-six (or 51% out of the total seventy-one schools) fell in this "not share" category, while nine schools (13%) did have the students share their journals with their on-site supervisors.[164]

A similar breakdown could be seen with regard to time logs. Although not specifically mentioned in Standard 305(e), if nothing else, section (b) of Standard 305 mandating that "[c]redit granted shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student,"[165]implies at a minimum that an accounting of the student's time has to be maintained. Possibly with this in mind, fifty-three (74%) of the seventy-one schools listed time logs as a requirement for their extern placement.[166] Thirteen schools (18%) did not.[167] The ma-

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[161] *See, e.g.,* Barbara A. Blanco & Sande L. Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students,* 10 CLINICAL L. REV. 611, 644-45 (2004); Harriet N. Katz, *Personal Journals in Law School Externship Programs: Improving Pedagogy,* 1 T.M. COOLEY J. PRAC. & CLINICAL L. 7 (1997); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection,* 3 CLINICAL L. REV. 55 (1996).

[162] Neither the Seibel & Morton nor the Stickgold & Schechter surveys explored this issue in depth. The Stickgold & Schechter survey did note that "18 schools require some form of diary/journal/logs/timesheets." Stickgold & Schechter, *supra* note 14, at 21.

[163] *See* question twenty-one, SURVEY RESPONSE DATA, *supra* note 39. Five (7%) were classified as "other" based on their answers.

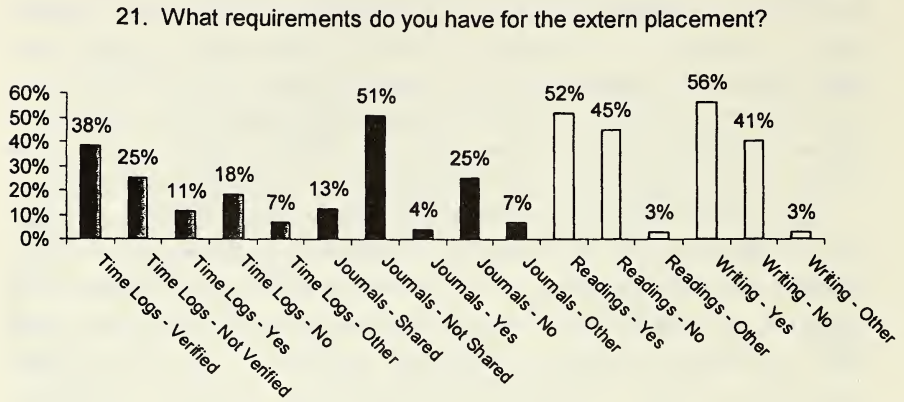
[164] *Id.*; *see also* Chart Twenty-one. The percentage in each category (time logs, journals, readings, and writing) is calculated with seventy-one equaling one-hundred percent. Note that three schools indicated they had a journal requirement, but did not specify whether the journals were shared or not. *Id.*

[165] *Supra* note 130.

[166] *Supra* note 163.

[167] *Id.*

jority of the schools which did require time logs, twenty-seven out of the fifty-three (or 38% of the total seventy-one schools), had such logs verified by the on-site supervisors, while eighteen (or 25% of the total seventy-one schools) did not.[168]



Question twenty-one also sought to inquire as to reading and writing requirements the schools may impose as part of their prosecutorial externship programs. Thirty-seven schools (52%) indicated they had a reading requirement as part of their prosecutorial externship program, while forty schools (56%) indicated they had a writing requirement.[169] This question was designed to elicit requirements specifically pertaining to the extern placement. However, the responses must be read with the realization that some of the respondents may have considered their classroom component as they answered this question. Regardless, there seems to be a clear trend of requiring a reading and writing component of prosecutorial externs across the country.

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[168] *Id.*

[169] *Id.*; *see also* Chart Twenty-one.

On-Site Supervisors

A successful prosecution externship program, or any externship program for that matter, depends upon three distinct groups of people: the students, the clinical faculty and the on-site supervisors.[170] The first group—the students, is selected by various means, as discussed above. This group is then trained and educated through the combined efforts of the second and third group, i.e., the clinical faculty and the on-site supervisors. Ideally, they will emerge from law school with a solid foundation upon and from which a good, professional and ethical neophyte lawyer can develop. The clinical faculty, presumably selected for their unique combination of practical experience and teaching capability, make up the second group of this triumvirate. As with any professional group, the clinical faculty is engaged in a continuous process of improving and learning from scholarship, each other at conferences, and trial and error, in how to be the best teachers possible. The selection, training and monitoring of the third group—the on-site supervisors, may be the most difficult aspect in this regard.[171] Absent ways instituted by the second group, i.e. the clinical faculty, no means to improve the educational aspects and abilities of this final and crucial group would exist, possibly leading to one of the worst fears of clinical faculty—that their students emulate bad practices as opposed to being able

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[170] Alexis Anderson et al., *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 476 (2004); *see also*, Ogilvy, *supra* note 32, at 161 (observing that "[t]here are three pillars to a successful externship experience. First, the student must be prepared and motivated to benefit from the experience. Second, the law school must provide support and educational value to the student and support to the fieldwork supervisor. Third, the fieldwork placement must be willing and able to provide the student with the appropriate range and depth of lawyering tasks and with high quality guidance, critique, and feedback through a supervisor motivated and capable of providing these.").

[171] Blanco & Buhai, *supra* note 161, at 611-12. "Monitoring effective and motivated supervision of off-campus law externs in a structured field placement program has traditionally been the chimera of law school curriculum." *Id.* (discussing general pedagogical theories of supervision, common barriers to effective supervision, and the Greater Los Angeles Consortium On Externships (GLACE) working solution).

to recognize both the good and the not so good and learn from both.[172]

As with credit hours and student requirements, certain aspects of the role of on-site supervisors are guided by the ABA accreditation standards. Standard 305(e)(4) mandates in no uncertain terms that "[a] field placement program *shall* include . . . a method for selecting, training, evaluating, and communicating with field placement supervisors."[173] This language seems to have had a similar unifying effect on the practice across the country pertaining to the training of and visiting with on-site supervisors, as has Standard 305(e)(7) in relation to "opportunities for student reflection" on the field placement experience through a "seminar, tutorial, or other means of guided reflection."[174]

With this in mind, five questions of the survey sought to probe the inter-relation between the programs and the placements. Question twenty-two sought to ascertain how students were supervised while at the prosecutor offices,[175] while question twenty-three asked how the on-site supervisors were selected.[176] Question twenty-four dealt with training programs for these on-site supervisors,[177] while twenty-five inquired into formalized on-site visits.[178] The final question in this sub-category sought to ascertain if formalized evaluations of the placements existed, and if so, how such information was used.[179]

Question twenty-two, asking how students were super-

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[172] *See* Condlin, *supra* note 127, at 345 (warning that "[s]tudents do not invariably learn effective practice skills working in outside law offices; sometimes they just 'practice their mistakes,' and those of their offices").

[173] STANDARD 305(e)(4), *supra* note 48 (emphasis added).

[174] STANDARD 305(e)(7), *supra* note 48. Whether the ABA Standard came first, followed by the standardized practice in clinical programs, or whether the practice developed into a community norm, to be followed by the Standard, is an interesting chicken or the egg question.

[175] *See* question twenty-two, SURVEY, Appendix A.

[176] *See* question twenty-three, SURVEY, Appendix A.

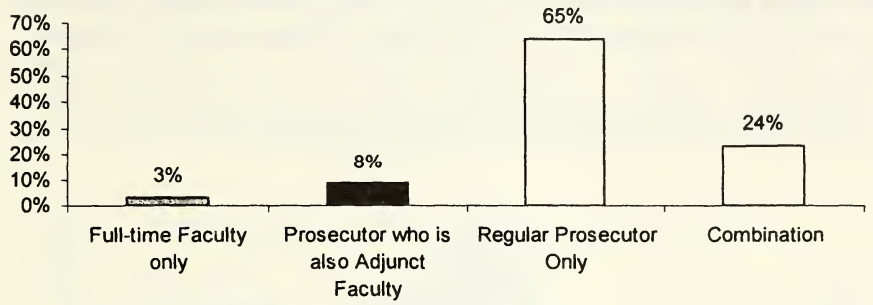
[177] *See* question twenty-four, SURVEY, Appendix A.

[178] *See* question twenty-five, SURVEY, Appendix A.

[179] *See* question twenty-six, SURVEY, Appendix A.

vised at the prosecutor offices, did not provide any surprises. The vast majority of programs, forty-six schools or 65%, had their students supervised by regular prosecutors.[180] The remaining schools used a combination (seventeen or 24%) or a prosecutor who was also an adjunct (six schools or 8%).[181]

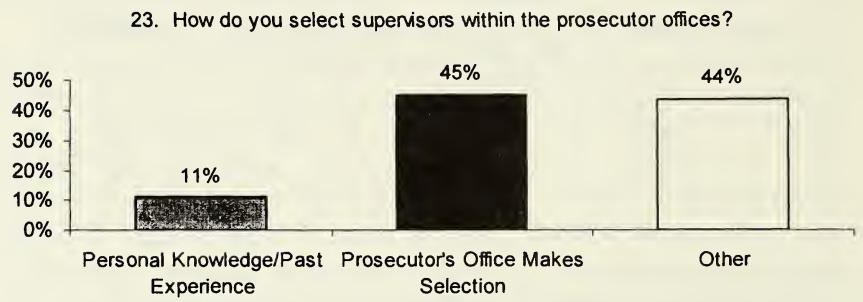
22. How are students supervised at the prosecutor offices?



[180] *See* question twenty-two, SURVEY RESPONSE DATA, *supra* note 39.

[181] *Id.*; *see also* Chart Twenty-two. Note that although schools seventeen and thirty-one indicated full-time faculty only, they were nevertheless determined to be externship programs as opposed to in-house clinics. School seventeen, for example, also noted that the prosecutor offices selected the supervisors, something which indicated that the full-time faculty response to question twenty-two was more meant to indicate supervision of the program as a whole, as opposed to specific on-site supervision of the externs. School thirty-one provided similarly conflicting information, indicating that the students were supervised by full-time faculty at the prosecutor office in response to question twenty-two, but also that such supervisors were selected by "personal contact and interest" in response to question twenty-three. Further in support of classifying school thirty-one as an externship program as opposed to an in-house clinic despite the response to question twenty-two, was the fact that the school provided two completed responses to the survey (one received in March of 2003, one in August of 2003). The answers provided in the March survey were used. However, the response to question twenty-two in the August survey indicated that regular prosecutors supervised the students at the prosecutor's office. See question twenty-two, SURVEY RESPONSE DATA, *supra* note 39, for responses from March 2003 returned survey by school thirty-one. (August 2003 returned survey from school thirty-one on file with author.) *Id.*

Anticipating many varied responses to question twenty-three, i.e., how the supervisors within the prosecutor offices were selected, the respondents were not given categories to check off, but rather were asked to provide a sentence or two explaining their selection process. The answers ranged from seemingly rather random[182] to meticulous.[183] Two discernable threads, however, emerged from the responses. The first was that personal knowledge and or past experiences played a crucial part in the school's selection of their on-site supervisors.[184] The second discernable thread was that a senior prosecutor made assignments within the prosecutor offices with regard to students working with suitable assistants.[185]



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[182] *See* question twenty-three, SURVEY RESPONSE DATA, *supra* note 39. "Whoever is assigned," (school twenty-three) and "They ask for students. Students ask for work in that office" (school twenty-five). *Id.*

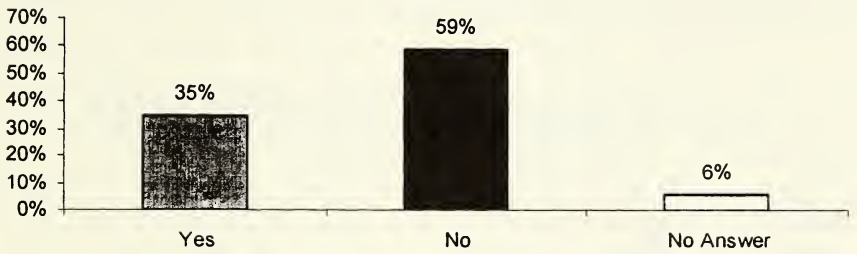
[183] *Id.* "Supervisors are nominated by offices. Must have two years post-Bar experience. When students wish to extern at a placement, Externship Committee reviews and approves or denies supervisor." (School twenty-one). *Id.*

[184] Eight responses indicated such. *See* question twenty-three, SURVEY RESPONSE DATA, *supra* note 39.

[185] Thirty-two responses indicated such. *Id.*; *see also* Chart Twenty-three. Note that these answers were culled from narrative responses by the respondents, and thus subject to a certain amount of subjective discretion in classification. As such, a large group (31 or 44%) of responses defined easy categorization. *Id.* There is, of course, a distinction between the on-site supervisor selected by the law school faculty to be in charge of ensuring the externs receive a valuable experience at a certain placement, and this on-site supervisor in turn selecting lawyers for the students to work with. Unfortunately, the wording of the question did not permit a better differentiation of the various answers. *Id.*

Once an on-site supervisor is selected, regardless of process, the literature and the standards both emphasize the importance of continuous supervision and training of such prosecutors by the school.[186] With that in mind, the responses to question twenty-four, seeking information about training programs for the on-site supervisors, and question twenty-five, seeking information about formalized on-site visits, were surprising. Only twenty-five (35%) schools indicated they had "any training program for the on-site supervisors."[187]

24. Do you have any training program for the on-site supervisors. If so, please describe such program.



This low number is particularly surprising considering the fact that any responses indicating manuals or handbooks were counted as positive responses. Conversely, the number may be skewed in that the *respondents* may have interpreted the question narrowly, i.e., limiting their responses to training programs only. In other words, the surprisingly low positive response may be more a reflection of a poorly worded question, than an accurate representation of the practice across the academy. This is particularly so considering Standard 305(e)(1) which seemingly requires that schools at a minimum

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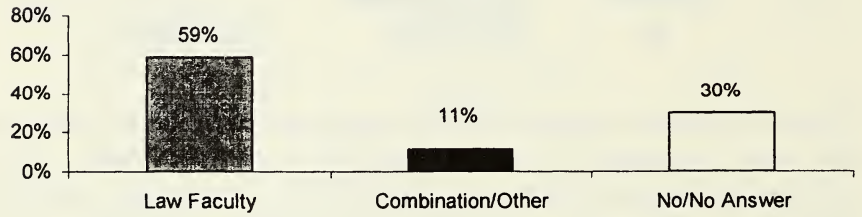
[186] *See supra* note 173. Standard 305(e)(4) mandates for "a method for selecting, training, evaluating and communicating with field placement supervisors. *Id.*; *see also* Blanco & Buhai, *supra* note 161.

[187] *See* question twenty-four, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Twenty-four.

provide some sort of manual describing their programs and outlining their expectations.[188] In fact, reading the answers to question twenty-four together with the responses to question thirty-two,[189] which indeed inquired if the schools used manuals or other guidelines outlining the responsibilities of the students and the supervisors, the positive number jumps to the expected range. A total of fifty schools (70%) indicated they used manuals or other guidelines outlining the program and/or the responsibility of the students and the supervisors.[190] Interestingly, out of the fifty schools which indicated they did have such manuals, eight were drafted by a combination of the law faculty and the on-site supervisors, a positive and hopeful trend of beneficial cooperation between two of the three partners of field placements.[191]

32. Does your program use any manuals or other guidelines outlining the program and/or the responsibilities of the students and the supervisors? If so, were they drafted by:



[188] *See supra* note 48. *See, e.g.,* University of Mississippi School of Law, *Prosecutorial Externship Program—Informational Manual*, *available at* http://www.olemiss.edu/depts/law_school/ruleoflaw/prosecutorial_externship/PEPmanual.pdf (last visited March 7, 2005.); *see also* Greater Los Angeles Consortium On Externships (G.L.A.C.E.) (Loyola Law School, USC Law School, Pepperdine Law School, Southwestern Law School, UCLA Law School, and Whittier Law School)—*Field Placement Supervisor Manual*, *available at* http://www.lls.edu/glace/manual.pdf (last visited March 7, 2005); *see also* Ogilvy, *supra* note 32, at 168 (discussing the use of written materials such as manuals in lieu of formal training sessions for on-site supervisors).

[189] *See* question thirty-two, SURVEY, Appendix A.

[190] *See* question thirty-two, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Thirty-two.

[191] *Id.*

If question twenty-four may have been unclear, question twenty-five was not. Question twenty-five asked if there were formalized on-site visits by faculty members, and if so, to describe how often and the primary purpose of such visits.[192] Standard 305(e)(5) currently calls for "periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for fieldwork in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate."[193] How effective on-site visits are has been questioned.[194] Despite the skepticism of the pedagogical value or worth of on-site visits, the majority of prosecution externship programs indicated they indeed did conduct on-site visits. Forty-two or 59% indicated in the positive, as opposed to twenty-five (35%) which said they did not conduct on-site visits.[195] However, even within the negative category, many respondents indicated some sort of physical contact, just not formalized such as once per semester or year.[196] The implication of Standard 305(e)(5) aside, the lack of a formalized visitation schedule with each placement, does not necessarily equate to a lower quality program. If indeed a placement has been carefully selected, the on-site supervisors adequately trained, and most importantly, students over time received proper mentoring experiences, a visit by a professor may not and should not be the determining factor in whether such a program is up to par or not.

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[192] *See* question twenty-five, SURVEY, Appendix A.

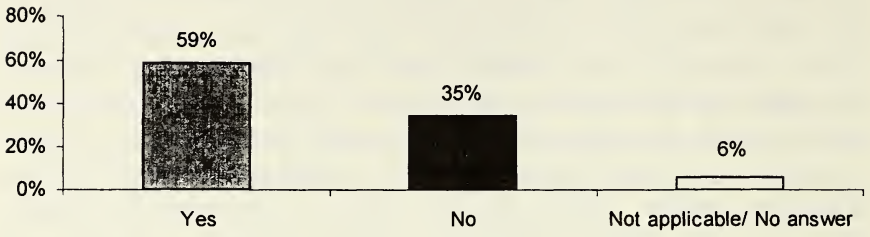
[193] Standard 305(e)(5), *supra* note 48.

[194] *See* Seibel & Morton, *supra* note 13, at 444 (questioning the pedagogical value of site visits); *see also* Ogilvy, *supra* note 32, at 168-169 (questioning effectiveness of on-site visits in general, but acknowledging that in some instances, such as when externs are practicing under a jurisdiction's student practice rule, or possibly when placed with inexperienced sole practitioner as opposed to a state attorney's office, "heightened monitoring, including on-site visits, may be called for"). *Id.*

[195] *See* question twenty-five, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Twenty-five.

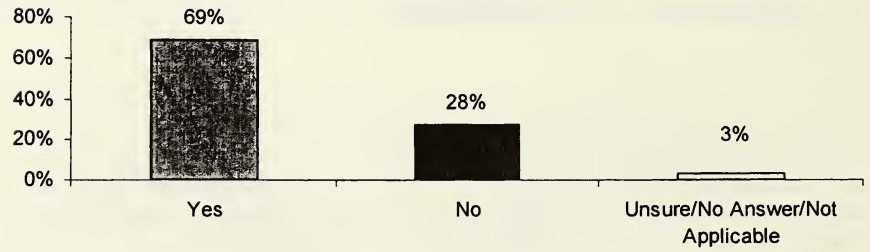
[196] *Id.* See, for example, responses by school one—"Nothing formalized. Periodic informal observation by faculty," and school fifty-eight—"No—some visits but generally not formal and not systematic." *Id.*

25. Do you have any formalized on-site visits by faculty members? If so, please describe how often and the primary purpose of such visits.



The final question pertaining to the regulation of on-site supervisors, inquired if the schools had formalized means of evaluating the placement office and/or on-site supervisors.[197] Not surprisingly, in light of Standard 305(e)(4) clearly mandating such,[198] the majority of programs answered in the affirmative. Forty-nine schools (69%) said yes, while only twenty schools (28%) indicated no.[199]

26. Do you have any formalized evaluaton of the placement office an/or supervisors? If so, please describe how you use such information.



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[197] *See* question twenty-six, SURVEY, Appendix A.

[198] Standard 305(e)(4), *supra* note 48.

[199] *See* question twenty-six, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Twenty-six. Interestingly, four schools implied in their answers that they were establishing such an evaluation procedure. See schools five, six, nine and thirty-six.

Clinical Externship Faculty Status

The status of clinical faculty has been subject to much debate. To what extent is and should clinical faculty be provided the same tenure track protection as non-clinical faculty,[200] and if so, should *externship* clinical faculty have the same protection and status as clinical faculty?[201] Unfortunately, the answers to these questions still differ widely among schools. Regardless of the status of clinical faculty at various schools, however, all such schools presumably concur with "the goal of Standard 405(c), i.e. to ensure that law schools can attract and retain quality full-time clinical faculty and thereby strengthen the clinical component of the law school curriculum."[202]

With this in mind, question thirty-one was designed to ascertain the status of the clinical faculty who direct prosecution externship programs. The respondents were provided a range of possible answers: tenure track, non-tenure track,

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[200] American Bar Association, Standards for Approval of Law Schools and Interpretations, Standard 405(c) (2005), *available at* http://www.abanet.org/legaled/standards/chapter4.html, addresses this issue, stating that:

> A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

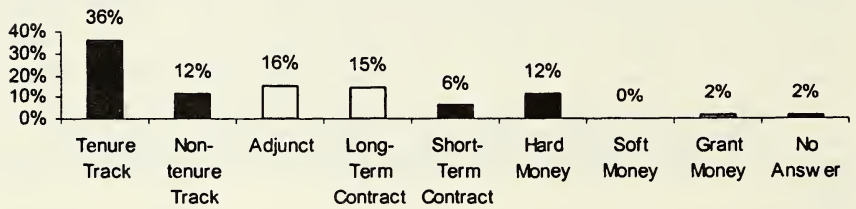
Id.

[201] As recently as 1995, it was noted that even as clinical teachers have moved into relative parity with doctrinal faculty, externship teachers have remained "the orphan children of the clinical movement." Givelbar et al., *supra* note 62, at 5 (citing Janet Motley, *Self-Directed Learning and the Out-of-House Placement,* 19 N.M. L. Rev. 211, 211 (1989)).

[202] *Proposed Revision of Chapter 4 of the Standards*, SYLLABUS, American Bar Association Section of Legal Education and Admissions to the Bar, Vol. 36, No. 2 (Feb. 2005), at 12.

adjunct, long-term contract, short-term contract, hard money, soft money and grant money.[203] Many schools provided more than one answer. Thus, the percentages in chart thirty-one are based upon 109 responses as opposed to seventy-one. Still, the numbers are telling. Thirty-nine schools (36%) responded that their prosecution externship clinical faculty were tenure track. Thirteen (12%) indicated non-tenure track and seventeen (16%) indicated adjunct.[204] Sixteen (15%) indicated the non-tenure track (presumably) were on long-term contracts, while seven (6%) indicated short-term contracts.[205] Gratefully, only two (2%) noted that their prosecution externship faculty were funded by grant money, the category which provides the least amount of "form of security of position reasonably similar to tenure."[206]

31. Are the faculty members who direct the prosecution externship program:



If viewed in a long term historical context, having 36% of clinical faculty teaching in an externship program as tenure track faculty can be seen as an improvement. However, in a short term comparison, this is only a 4% increase from 1989-1990. In that year, 32% of all one thousand six-hundred thirteen externship teachers were "Full-Time Permanent," while 52% were "Part-Time/Part-Time Permanent," and 16% were

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[203] *See* question thirty-one, SURVEY, Appendix A.
[204] *See* question thirty-one, SURVEY RESPONSE DATA, *supra* note 39.
[205] *Id.*
[206] ABA Standard 405(c), *supra* note 200; *see also* Chart Thirty-one.

"Full-Time Not Permanent."[207] Whether this slight increase should be viewed as a cause for hope can be debated. However, if one views the current results as a snap-shot in time of the status of externship clinical faculty, then the fact that only one third of schools have seen fit to grant their clinical faculty (albeit clinical *externship* faculty) tenure track status is nothing short of appalling. Absent a consensus among the legal community as a whole that professional skills training obtained through clinical programs and field placement programs in particular is inferior to other mandated aspects of legal education, there is simply no valid reason why 64% of clinicians directing such programs should teach under less than equal status of other faculty.[208]

Arguably related to the status of clinical prosecution externship faculty, is the perception by the non-clinical faculty of the schools' prosecution externship programs. Question thirty probed precisely this, asking how the prosecution externship faculty would describe the acceptance of the program by the non-clinical faculty.[209] Considering that this question asked for one person's perception of what another group's acceptance is of that person's work, and thus admittedly very prone to subjectivity, it was comforting to find that

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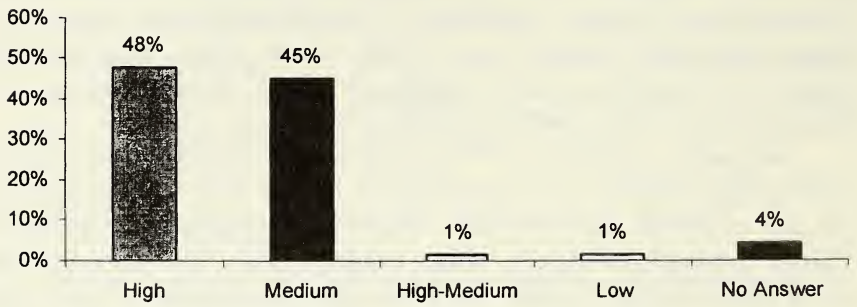
[207] MacCrate Report, *supra* note 13, at 247. By comparison, the MacCrate Report found that out of all 933 clinical (non-externship) teachers, 65% were "Full-Time Permanent," 13% were "Part-Time/Part-Time Not Permanent" and 21% were "Full-Time Not Permanent." *Id.* The comparison between tenure track and "Full-Time Permanent," may not be exact. Presumably some of the "Full-Time Permanent" faculty in 1989-1990 may not have been tenure track, which indeed then indicates a greater improvement of the status of externship clinical faculty today.

[208] The author recognizes that there are indeed clinicians who do not want to teach on a tenure track basis. An individual *declining* equal status within an institution is, however, strikingly different from an institution *imposing* un-equal status upon an individual within such institution. This is particularly so within academic institutions which are governed to a large extent by their faculty members. See Chavkin, *supra* note 94, at 274 for emphatic discussion of the negative aspects associated with short-term status instructors, including lack of governance participation, alienation from life at their institutions and twelve month employment denying opportunity for scholarship.

[209] *See* question thirty, SURVEY, Appendix A.

only one respondent described the non-clinical faculty's acceptance of that school's prosecution externship program as low.[210] Indeed, thirty-four respondents (48%) characterized the acceptance as high and thirty-two (45%) characterized the acceptance as medium (with one noting "High-Medium").[211]

30. How would you describe the acceptance of the program by the non-clinic faculty?



A 94% high to medium acceptance rate cannot be described as anything but superb. However, considering this, one is left with the possible and troubling conclusion that it is not a perceived lack of quality of this component of clinical education which prevents a greater number of schools to offer tenure track to the professors teaching externship programs. Clearly, the academy as a whole recognizes the need for clinical education[212] and recognizes that it provides a quality education.[213] One can only speculate as to why so many schools insist on maintaining the separate but equal concept, a concept which is as inherently wrong in legal education today when used to keep clinical faculty from being fully integrated with law school faculties as it was in the days of yore.

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[210] *See* question thirty, SURVEY RESPONSE DATA, *supra* note 39.

[211] *Id.*; *see also* Chart Thirty.

[212] *See* Standard 302(B)(1), *supra* note 8.

[213] Hence the high to medium acceptance of prosecution externship programs. *See supra* note 211.

Classroom Component

The final set of questions pertained to the classroom component (if any) of the various programs. Although a class is not mandated by the Standards,[214] the majority of programs included a classroom component.[215] Fifty-two schools (72%) offered a seminar or other class in conjunction with their prosecution externship program, while eighteen (25%) did not.[216] These numbers reflect an increase from the 1992-93 Seibel & Morton study which found that 69% of their ninety-eight programs offered a classroom component.[217] Out of the fifty-two schools which offered a classroom component, forty-seven (66%) made this class a co-requisite of the externship program.[218] Two (3%) made the class a pre-requisite.[219]

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[214] *See* Standard 305, *supra* note 120, at Standard 305(e)(7) mandating "opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection," thus leaving the means to achieve such reflection open.

[215] Although the survey results showed a great proclivity towards satisfying Standard 305(e)(7) through a classroom component, not all agree. See Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 CLINICAL L. REV. 659 (2004), arguing that "the value of the externship class rises in direct proportion to the commonality of the students' placements" and that as such "[t]he externship class should not be imposed, *de facto* or *de jure*, on all externship programs." *Id.* at 660. While it may be true that the educational value of a class for students placed in field placements as varied as, for example, a prosecutor's office and an in-house counsel of a charitable hospital, may be difficult to assess, having a classroom component to a specialized prosecution field placement program, does not suffer from the same concerns. As Eisinger noted, the "commonality" of the placement, would then enhance the benefit of the class. *Id.*

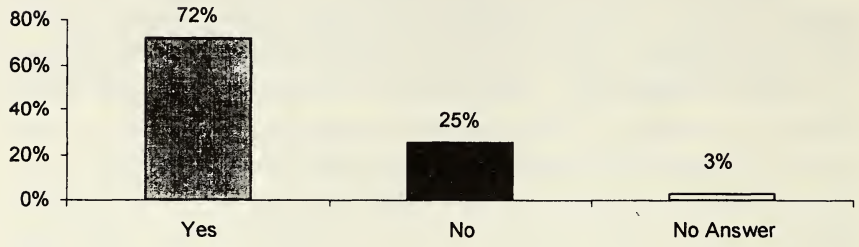
[216] *See* question thirty-three, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Thirty-three. Question thirty-four asked what the titles of such classes were. A list of responses can be found in question thirty-four. *Id.*

[217] Seibel & Morton, *supra* note 13, at 429.

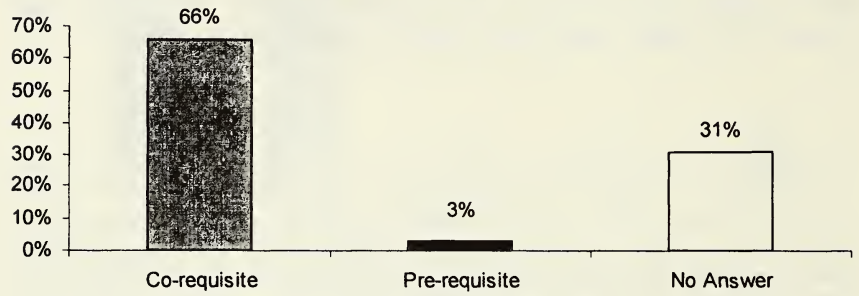
[218] *See* question thirty-five, SURVEY RESPONSE DATA, *supra* note 39.

[219] *Id.*; *see also* Chart Thirty-five. Question thirty-six asked the respondents to indicate the subject matters covered in the class. Twenty (28%) offered a combination of procedure, substantive law, and ethics/professionalism, i.e. these twenty programs covered some proportion of all these subjects. *See* question thirty-six, SURVEY RESPONSE DATA, *supra* note 39.

33. Do you offer a seminar or other class in conjunction with the externship program?



35. Are such classes co- or prerequisites to the externship program?



Sixteen schools (23%) graded their classroom component separately from their prosecution externship program, while thirty-two (45%) did not.[220] Although seventeen (24%) of the respondents noted that no separate credit hours were offered for the class apart from the credit hours offered for the prosecution externship placement, those which did offer separate credit hours for the class as a whole ranged between one and four credit hours.[221]

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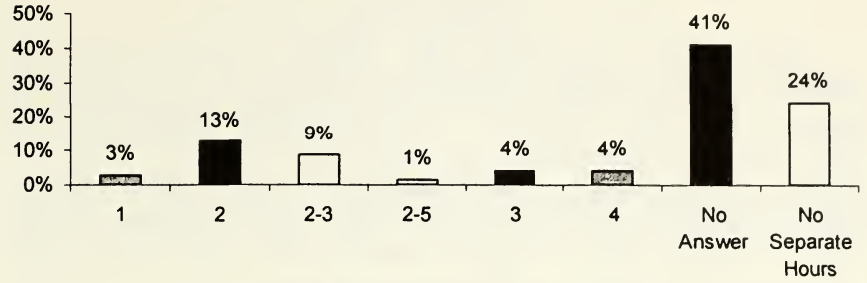
[220] *See* question thirty-seven, SURVEY RESPONSE DATA, *supra* note 39. Twenty-three schools (32%) did not provide an answer.

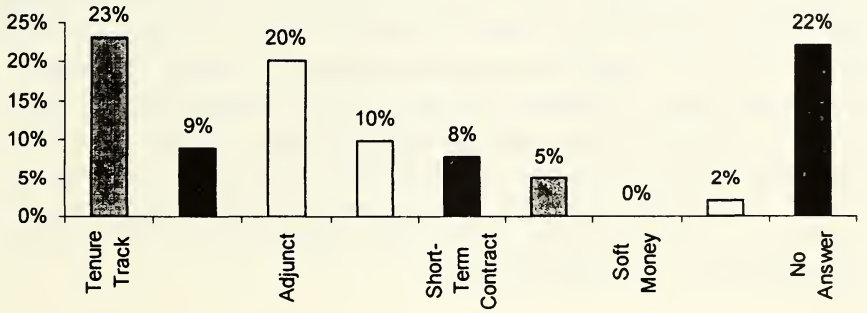
[221] *See* question thirty-nine, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Thirty-nine. Note that a substantial number (29 or 41%) did not provide an answer to this question. The percentage calculations in this question were based upon seventy instead of seventy-one responses in light of school five providing an answer of fifteen credit hours, which was so different from all other responses, indicating a possible misunderstanding of the question.

39. How many credit hours are these classes?



The final question of the survey sought to ascertain the faculty status of those who taught the classroom component in the same way questions thirty and thirty-one addressed this in terms of those who directed the prosecution externship program.[222] While thirty-nine of the faculty members who directed the prosecution externship programs were tenure track,[223] only twenty-three of those who taught the classroom component were.[224] This difference seems to be at least partly due to the increased number of adjuncts who taught the class, twenty as opposed to seventeen who directed the prosecution externship program.[225]

40. Are the faculty members who teach these classes:



[222] *See* question forty, SURVEY, Appendix A.

[223] *See supra* note 204.

[224] *See* question forty, SURVEY RESPONSE DATA, *supra* note 39; *see also* Chart Forty. None that many schools provided more than one response to question forty, for a total of ninety-nine responses (thus making the number and the percentages virtually the same).

[225] *Id.*

CONCLUSION

There can be no doubt that clinical education has advanced from its initial "beachhead"[226] and is now firmly entrenched in legal education. Nor can there be any doubt that field placement programs are firmly entrenched as a part of clinical legal education. The debate is no longer about whether this is a good or bad thing or whether clinical programs as a whole should be part of legal education, but rather it is about ensuring that students participating in these clinical programs receive a quality education which is both beneficial to them individually and to the legal profession as a whole. In this respect, prosecution externship placements fill a special role of clinical legal education. Prosecutor placements provide an opportunity for students to learn trial level skills, as well as the unique ethical and professional responsibilities which come with the prosecutor's dual role as both an advocate and a minister of justice. Possibly due to any one or all of these reasons, prosecution field placement programs are ubiquitous across the legal landscape today. There is no doubt that as more schools seek to provide the benefits of skills training to more of their students, they will do so by expanding field placement programs. The cost of in-house clinics, if nothing else, will dictate this route. As this occurs, it is hoped that this article, by exploring and presenting the state of prosecution externship programs today and by comparing it when possible with the past, will provide guidance for how the field should develop in the future. Certainly, the many instances of where standards, literature and practice all converge can be viewed as paths built upon the past, embraced by the present, and leading us into the future.

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[226] McDiarmid, *supra* note 56.

APPENDIX A

PROSECUTION EXTERNSHIP SURVEY

INFORMATION COLLECTED TO BE PRESENTED AT "EXTERNSHIP 2 - LEARNING FROM EXPERIENCE"
CONFERENCE, MARCH 7-8, 2003

PLEASE COMPLETE AND RETURN THE SURVEY IN THE ENCLOSED SELF-ADDRESSED, STAMPED ENVELOPE AT YOUR EARLIEST CONVENIENCE.

PLEASE INCLUDE COPIES OF SYLLABI AND OTHER PERTINENT MATERIAL.

Thank you.

Hans P. Sinha
Clinical Professor and Director
Prosecutorial Externship Program
The National Center for Justice and the Rule of Law
The University of Mississippi School of Law
P.O. Box 1848
University, MS 38677-1848
(662) 915-6884
hsinha@olemiss.edu

Dear Prosecution Externship Survey Participant:

The impetus for this survey came about when I moved from the Tulane Criminal Clinic to direct the Prosecutorial Externship Program at the University of Mississippi. I was able to get some information from various professors who directed similar programs. Still, I wished that there had been some central source I could have gone to in order to see how other programs were run. With this in mind, the information obtained through this survey will be compiled and presented at the "Externship 2--Learning From Practice" conference at the Catholic University of America, March 7-8, 2003.

I envision a compilation of various syllabi and related documents as being of utmost importance and interest. Thus, please include copies of your syllabus and other pertinent documents with the completed survey in the self-addressed, stamped envelope provided. You can also email any documents to me at hsinha@olemiss.edu. A compilation of such syllabi will be available at the conference. A list of reading requirements and other class requirements will also be compiled from the submitted syllabi for distribution at the conference. Appropriate credit will always be given. If you are not attending the conference, but would like a representative sample of submitted syllabi mailed to you, please email your mailing address to me.

While the survey asks for your name and your school, no individual or institutional identifying information will be used in the presentation of the survey data. The survey should not take more than ten minutes to complete.

Finally, if you prefer to take the survey on-line (I did both and recommend the on-line version), please go to www.ncjrl.org, click on the "A Prosecutorial Externship Program" link, and then on the "Prosecution Externship Survey" link. If you choose to complete the on-line survey, please email your syllabi and other documents to me separately, or mail hard copies to me using the enclosed envelope.

I thank you beforehand for your help, and hope that this endeavor will prove fruitful, and that we will all be able to learn and benefit from each others' programs.

Sincerely,

Hans P. Sinha

Prosecution Externship Survey

Name:_____ School:_____
Email:_____ Phone:_____
Address:_____
_____
(No individual or institutional information will be used in the presentation of the data.)

General School Information

1. How large is your law school?
   ___ under 500 ___ 500-1000 ___ 1000+
2. Does your school have a part-time program?
   ___ Yes ___ No
3. If yes, can part-time students participate in the prosecution externship program?
   ___ Yes ___ No ___N/A
4. How many clinical programs (including externships) does your school offer?
   _____
5. Is participation in a clinical program required for all students?
   ____ Yes ___ No
6. Which students can participate in the clinical programs?
   ___ 1L ___ 2L ___ 3L
7. Which students can participate in the prosecution externship program?
   ___ 1L ___ 2L ___ 3L
8. Does your school offer both a prosecution externship program and a prosecution clinic?
   ___ Yes ___ No
9. Does your school offer a criminal defense externship and/or clinic as well?
   ___ Yes ___ No
10. Do you place students primarily in an urban or a rural setting?
    ___ Urban ___ Rural ___ Both

Externship Program

11. How many students participate in your prosecution externship program?
    ___ 0-10 ___ 10-20 ___ 20-30 ___ 30-40 ___40+
12. What type of prosecutor offices do you place students in? If several, please indicate average approximate percentage of placements.
    _____ US Attorney _____ DA _____ AG
    _____County _____ City

13. If you place students with US Attorney and/or Attorney General offices, do the students work in both the criminal and the civil division?
    Criminal only _____ Civil only _____ Both _____
14. How many credit hours can a student earn for participation in the externship program? If there is a range, please give the range.
    _____/semester
15. How many "on-site" hours translate to such credit hours?
    _____/semester
16. What pre-requisites or co-requisites do you have for the externship?
    _____
    _____
17. Do you cover ethics and professionalism as part of the externship program? If so, how?
    _____
    _____
    _____
18. How are students selected to participate in the externship program?
    _____
    _____
19. What grade option do you use for the externship program?
    ABC _____ Pass/Fail _____ Other _____
20. Are the students sworn in under a limited practice rule?
    _____ Yes _____ No
21. What requirements do you have for the extern placement? Please note any significant feature of such requirements.
    Time logs _____
    Do you require on-site supervisors to verify?_____
    Journals _____
    Are these shared with on-site supervisors? _____
    Reading requirement_____
    Writing requirement_____
    Other_____
22. How are the students supervised at the prosecutor offices?
    Full-time faculty member _____
    Prosecutor who is adjunct faculty _____
    Regular prosecutor _____
    Other. Please describe:
    _____
23. How do you select the supervisors within the prosecutor offices?
    _____
24. Do you have any training program for the on-site supervisors? If so, please describe such program and include any forms or other material used for this purpose with the returned survey.
    _____
25. Do you have formalized on-site visits by faculty members? If so, please

describe how often and the primary purpose of such visits.

_____

26. Do you have a formalized evaluation of the placement office and/or supervisors? If so, please describe how you use such information, and include any forms used for this purpose with the returned survey.

_____

27. If you do not have a concurrent class component with the externship placement, do you use computer list serves, Blackboard, TWEN or other similar methods to meet electronically with your students during the semester? If so, please describe briefly.

_____

28. Do you permit the inclusion of travel time in the required on-site hours?

___ Yes ___ No

29. Do you reimburse out-of-pocket student expenses such as parking?

___ Yes ___ No

30. How would you describe the acceptance of the program by the non-clinic faculty?

___ High ___ Medium ___ Low

31. Are the faculty members who direct the prosecution externship program:

___ Tenure track ___ Non-tenure track ___ Adjunct
___ Long-term contract ___ Short-term contract
___ Hard money ___ Soft money ___ Grant money

32. Does your program use any manuals or other guidelines outlining the program and/or the responsibilities of the students and the supervisors? (Please provide copies.) If so, were they drafted by:

___ Law faculty ___ On-site supervisors
___ Combination ___ Other
If other, please describe

_____

Class Components

33. Do you offer a seminar or other class in conjunction with the externship program?

___ Yes ___ No ***If no, it is unnecessary to complete the remainder of this form; however, please refer to No. 41 at the end of this survey, and remember to mail in copies of requested documentation.***

34. If yes, what are the titles of those classes?

_____

35. Are such classes co- or prerequisites to the externship placement?

___ Prerequisite ___ Co-requisite ___ Neither

36. Please indicate by percentage the subject matters covered in the class. Please provide copies of syllabus.

___ Procedure ___ Substantive ___ Ethics/Professionalism ___Other

37. Are these classes graded independently of the externship placement?

___ Yes ___ No

38. What grade option do you use for these classes?

___ ABC ___ Pass/Fail ___ Other

39. How many credit hours are these classes?

_____ _____ /semester

40. Are the faculty members who teach these classes:

___ Tenure track ___ Non-tenure track ___ Adjunct

___ Long-term contract ___ Short-term contract

___ Hard money ___ Soft money ___ Grant money

41. Please remember to include in the return envelope copies of any syllabi or other descriptive material pertaining to classes, on-site supervisor training forms, on-site supervisor evaluation forms, manuals, and descriptions of your prosecution externship program. This material will be compiled and made available at the Externship Conference in March, 2003, with the hope that we can all learn from each others= programs.

APPENDIX B

Schools Participating in Prosecutorial Externship Survey

Albany Law School
American University Washington College of Law
Ave Maria School of Law
Baylor University
Brandeis School of Law, University of Louisville
Brooklyn Law School
Campbell University School of Law
Capital University Law School
Catholic University
Chapman University School of Law
Cleveland - Marshall
Emory University
Fordham
Georgia State
Louisiana State University
Loyola - Los Angeles
Mercer
Michigan State University - Detroit School of Law
Mississippi College School of Law
New York Law School
New York University
Northern Illinois University School of Law
Ohio Northern University
Pepperdine
Regent University School of Law
Roger Williams University School of Law
Salmon P. Chase, Northern Kentucky University
Seattle University
St. John's University
St. Louis University School of Law
Stanford
Stetson College of Law
Syracuse University College of Law
Texas Tech
The John Marshall Law School
Thomas Jefferson School of Law
Thomas M Cooley
Touro College Law Center
University of Akron
University of Arizona
University of Baltimore

University of California, Davis School of Law
University of California Hastings College of the Law
University of Colorado
University of Connecticut
University of Georgia
University of Hawaii
University of Illinois at Champaign
University of Iowa
University of Memphis
University of Mississippi
University of Missouri
University of Montana
University of Oregon
University of Pennsylvania
University of Pittsburgh
University of Richmond
University of San Diego
University of Southern California
University of Tennessee
University of Texas
University of Toledo College of Law
University of Tulsa
University of Utah
University of Virginia
University of Wisconsin
University of Wyoming
Vermont School of Law
Washington & Lee
Washington University
Wayne State
Western New England School of Law
Yale

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